Supreme Court, U.S.
FILED
07-506 OCT 12 2007
OFFICE OF THE CLERK

No. (1)

In The

Supreme Court of the United States

JAMES R. GIBSON,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

GERALD R. SMITH
Counsel of Record
LAW OFFICES OF GERALD R. SMITH
505 W. Riverside, Suite 215
Spokane, WA 99201
Telephone: (509) 252-5051

(716) SLF LAW BRIEF PRINTING CO. · 800 225 6964
OR CALL COLLECT (402) 342 2831

QUESTIONS PRESENTED

1. Whether any authority exists for a district or appellate court to vacate a validly entered and validly accepted guilty plea without an express request by the defendant.

2. Whether jeopardy attaches at the time of entry of a guilty plea, thus barring, under principles of double jeopardy, the reinstatement of counts dismissed as a result of the plea when the plea is vacated without an express request by the defendant.

3. If the answer to Question 1 is yes and to Question 2 is no, whether contract principles and due process considerations require the government to honor promises and commitments made in the plea agreement.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
18 U.S.C. §371	2
United States Constitution, Amendment V	2
Fed.R.Crim.P. 11	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	10
1. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A COURT HAS ANY AUTHORITY TO VACATE A GUILTY PLEA WITHOUT AN EXPRESS REQUEST BY THE DEFENDANT	11
2. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER JEOPARDY ATTACHES AT THE TIME OF ENTRY OF A GUILTY PLEA AND WHETHER SUCH ATTACHMENT OF JEOPARDY BARS, UNDER PRINCIPLES OF DOUBLE JEOPARDY, REINSTATEMENT OF COUNTS DISMISSED AS A RESULT OF THE PLEA, THUS PROVIDING LOWER COURTS WITH GUIDANCE AS TO THE LIMITS OF *OHIO v. JOHNSON*, 467 U.S. 493 (1984)	16

TABLE OF CONTENTS – Continued

Page

3. THIS COURT SHOULD RESOLVE THE CONFLICT CONCERNING THE IMPORTANT QUESTION WHETHER CONTRACT PRINCIPLES AND DUE PROCESS CONSIDERATIONS REQUIRE THE GOVERNMENT TO HONOR PROMISES AND COMMITMENTS MADE IN THE PLEA AGREEMENT 22

CONCLUSION 29

APPENDIX

United States v. Gibson, 490 F.3d 604 (7th Cir. 2007) ("*Gibson II*") ..... App. 1

United States v. Gibson, 356 F.2d 761 (7th Cir. 2004) ("*Gibson I*") ..... App. 11

District Court Status Conference, 4/11/02 (Excerpt) ..... App. 24

Change of Plea Hearing, 1/8/02 (Excerpt) ..... App. 29

Order Denying Rehearing and Rehearing En Banc, 7/17/07 ..... App. 32

Memorandum of Law Explaining the Court's March 14, 2005 Oral Rulings (Excerpt) ..... App. 33

Plea Agreement, 1/8/02 ..... App. 37

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Ashe v. Swenson, 397 U.S. 436 (1970) 21

Austin v. United States, 509 U.S. 602 (1993) 18

Bailey v. United States, 516 U.S. 137 (1995) 27

Brady v. United States, 397 U.S. 742 (1970) .. 14, 15, 27

Brown v. Ohio, 432 U.S. 161 (1977) 21

Ohio v. Johnson, 467 U.S. 493 (1984) 16, 19, 20, 21

Santobello v. New York, 404 U.S. 257 (1971) 23

United States v. Halper, 490 U.S. 435 (1989) 18

United States v. Hyde, 520 U.S. 670 (1997) 12, 15

OTHER CASES

Dawson v. United States, 77 F.3d 180 (7th Cir. 1996) 17, 18, 19

In re Ellis, 356 F.3d 1198 (9th Cir. 2004) (en banc) 11, 12, 13, 15, 22

Randazzo v. Harris Bank Palatine, N.A., 262 F.3d 663 (7th Cir. 2001) 25, 26

United States v. Aliotta, 199 F.3d 78 (2nd Cir. 1999) 17

United States v. Alt, 83 F.3d 779 (6th Cir. 1996) 18

United States v. Ataya, 864 F.2d 1324 (7th Cir. 1988) 17, 23

United States v. Atkinson, 259 F.3d 648 (7th Cir. 2001) 23, 25

TABLE OF AUTHORITIES – Continued

Page

United States v. Bailin, 977 F.2d 270 (7th Cir. 1992) 21

United States v. Barnes, 83 F.3d 934 (7th Cir. 1996) 10

United States v. Barron, 172 F.3d 1153 (9th Cir. 1999) (en banc) 26, 27, 28

United States v. Bond, 87 F.3d 695 (5th Cir. 1996) 17, 18

United States v. Bowler, 585 F.2d 851 (7th Cir. 1978) 23

United States v. Brocksmith, 991 F.2d 1363 (7th Cir. 1993) 21

United States v. Bullock, 579 F.2d 1116 (8th Cir. 1978) 17

United States v. Cabaccang, 332 F.3d 622 (9th Cir. 2003) (en banc) 26

United States v. Cambindo Valencia, 609 F.2d 603 (2nd Cir. 1979) 17

United States v. Gibson, 356 F.3d 761 (7th Cir. 2004) ("*Gibson I*") 1, 9, 10, 14, 15

United States v. Gibson, No. 07-1737 (7th Cir. 2005) 8, 15

United States v. Gibson, 490 F.3d 604 (7th Cir. 2007) ("*Gibson II*") 1, 15

United States v. Ingram, 979 F.2d 1179 (7th Cir. 1992) 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Jerry, 487 F.2d 600 (3rd Cir. 1973)..... 17

United States v. Jimenez, 992 F.2d 131 (7th Cir. 1993)..... 23

United States v. Lopez, 385 F.3d 245 (2nd Cir. 2004)..... 11, 12, 15, 22

United States v. Patterson, 381 F.3d 859 (9th Cir. 2004)..... *passim*

United States v. Patterson, 406 F.3d 1095 (9th Cir. 2005)..... 19, 20

United States v. Peterson, 268 F.3d 533 (7th Cir. 2001)..... 10

United States v. Ritsema, 89 F.3d 392 (7th Cir. 1996)..... 12

United States v. Schilling, 142 F.3d 388 (7th Cir. 1998)..... 23

United States v. Transfiguracion, 442 F.3d 1222 (9th Cir. 2006)..... 22, 26, 27, 28

United States v. Ursery, 59 F.3d 568 (6th Cir. 1995)..... 17, 18

United States v. Williams, 102 F.3d 923 (7th Cir. 1996)..... 23

United States v. Williams, 534 F.2d 119 (8th Cir. 1976)..... 17

United States v. Wong, 62 F.3d 1212 (9th Cir. 1995)..... 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Young, 503 F.2d 1072 (3rd Cir. 1974) 17

United States v. Zweber, 913 F.2d 705 (1990) 28

United States ex rel. Stevens v. Circuit Ct. of Milwaukee County, Wis., Branch VIII, 675 F.2d 946 (7th Cir. 1982) 17, 18

CONSTITUTIONAL AUTHORITY

United States Constitution, Amendment V 2

STATUTORY AUTHORITY

18 U.S.C. § 371 ..... 2, 3, 7, 21

OTHER AUTHORITY

Fed.R.Crim.P. 11 ..... *passim*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner JAMES R. GIBSON, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The Seventh Circuit's Opinion on the first appeal, App. 11, vacating "the sentence, conviction, guilty plea and acceptance thereof" is published at 356 F.3d 761 (*Gibson I*). The Circuit's Opinion on the second appeal, App. 1, is published at 490 F.3d 604 (*Gibson II*). The Circuit's Order denying the Petition for Rehearing or Rehearing En Banc, App. 32, is not published.

JURISDICTION

The Seventh Circuit issued its Opinion in *Gibson II* on June 19, 2007, and denied the Petition for Rehearing or Rehearing En Banc on July 17, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 371

18 U.S.C. § 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

United States Constitution, Amendment V

The United States Constitution, Amendment V, provides, in pertinent part: " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Fed.R.Crim.P. 11

When Petitioner entered a guilty plea on January 8, 2002, Rule 11 of the Federal Rules of Criminal Procedure stated in pertinent part:

> **(e) Plea Agreement Procedure**
>
> **(1) In General.** The attorney for the government and the attorney for the defendant . . . may agree that upon the defendant's entering a plea of guilty or nolo contendere to a charged

offense, or to a lesser charge, the attorney for the government will:

. . .

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case. . . .

. . .

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record . . . advise the defendant personally in open court, . . . afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea . . . the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

The rule was amended effective December 1, 2002, and now states:

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney . . . may discuss and reach a plea agreement. If the defendant pleads guilty . . . to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case. . . .

. . .

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

. . .

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the Southern District of Illinois was based on 18 U.S.C. § 3231. The jurisdiction of the United States Court of Appeals for the Seventh Circuit was based on 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On October 18, 2001, a grand jury sitting in the Southern District of Illinois charged James R. Gibson by superceding indictment with one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §§ 371, 1341, and 1343 (count 1), three counts of mail fraud in violation of 18 U.S.C. § 1341 (counts 2-4), two counts of wire fraud in violation of 18 U.S.C. § 1343 (counts 5-6), one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (count 7), and a forfeiture count pursuant to 18 U.S.C. § 982 (count 8).

On January 8, 2002, Petitioner entered a guilty plea to count 1 of the superseding indictment. The plea was pursuant to a written agreement. App. 37. The agreement entered into under the then existent version of Rule 11(e)(1)(C), provided that parties would make a joint recommendation to the Court for a sentence of 262 months. App. 41. The Agreement further stated that

> If the court rejects the plea agreement, it must advise the defendant of this fact, afford the defendant an opportunity to withdraw his plea, and advise the defendant that if he persists in his plea of guilty the disposition may

> be less favorable than contemplated in the plea agreement. Rule 11(e)(4).

App. 41. The government agreed that aside from the counts to which Petitioner was pleading, "The Defendant will not be prosecuted in the Southern District of Illinois for any other crimes now known to the government. App. 40.

In "exchange for the concessions made by the United States in this plea agreement," Petitioner "knowingly and voluntarily waives his right to appeal any sentence *within the maximum provided in the statutes of conviction. . . .*" App. 43 (Emphasis added).

At the change of plea hearing, the District Court noted that the agreement was in accordance with then Rule 11(e)(1)(C), *see supra*, and advised Petitioner of his rights. After further explaining legal rights and establishing a factual basis, the District Court found as follows:

> Since you acknowledge that you are in fact guilty as charged in count 1; since you know your right to a trial; what the maximum possible punishment is; and since you are voluntarily pleading guilty; *I will accept your guilty plea and enter a judgment of guilty on your plea.*
>
> However, pursuant to section 6B1.1(c) of the guidelines, *I have to defer my decision to accept or reject the plea agreement between you and the government* until after I have had an opportunity to consider the presentence

> report. In fairness, I do not expect there will be a problem with that at all.

App. 30-31 (emphasis added).

The Court held a status hearing on April 11, 2002, based on Petitioner's expression of dissatisfaction with his attorney. Petitioner stated his dissatisfaction was grounded on his belief that counsel had based his advice on the guilty plea on the government's holding of the purse strings with respect to counsel being paid, and that the plea agreement called for a sentence in excess of the five-year maximum. App. 26-27. Four days later on April 15, 2002, Petitioner was sentenced to 22 years imprisonment.

The sentence was appealed and the Federal Public Defender of Central Illinois was appointed on appeal. After the Seventh Circuit rejected the Anders Brief that was initially filed and ordered briefing on the issue of the statutory maximum, it issued an Opinion on January 8, 2004. 356 F.3d 761, App. 11. That Opinion vacated the sentence, the conviction, the guilty plea and the District Court's acceptance of the plea, and remanded to the District Court for further proceedings. App. 22-23. The Court's decision was based on the clear language of 18 U.S.C. § 371 that established a five-year maximum sentence for the offense of conviction. The Court refused to merely remand for resentencing.

After remand, the government moved to reinstate the dismissed counts, and they were reinstated by the District Court's order on July 14, 2004. On August 31, 2004, the District Court denied Petitioner's motion to

dismiss on grounds of double jeopardy. Petitioner filed a pro se motion to reconsider the denial on February 24, 2005, which was orally denied on March 14, 2005. The Court issued a further order on March 21, 2005, in which it explained some of its prior rulings. In that order, the Court stated that Petitioner "can't make a colorable showing he has once been placed in jeopardy." App. 35. The Seventh Circuit Court of Appeals dismissed Petitioner's interlocutory appeal from that order on April 1, 2005, stating that "The district court has not yet entered a final judgment in this case and its order of March 21, 2005, is not appealable as a collateral order." *United States v. Gibson*, No. 07-1737 (7th Cir. 2005).

Petitioner proceeded to trial *pro se* and was found guilty of all counts and sentenced to 60 months on counts 1-6, and 120 months on count 7, with all sentences to run consecutively for a total of 480 months (40 years), nearly twice the original sentence.

Petitioner again appealed. Appointed Counsel raised only issues relating to the statute of limitations with respect to some of the charges. Petitioner then retained counsel, but difficulties in communications between Petitioner and counsel resulting from the fact that Petitioner is incarcerated in the Maximum Security Prison in Florence, Colorado, prevented finalizing the representation until shortly before oral argument was scheduled. February 15, 2007, Declaration of Counsel to CA. The Seventh Circuit denied repeated motions to allow substitution of counsel and to delay oral argument to permit supplemental briefing. After oral argument, the Court

granted the motion for substitution of counsel and supplemental briefing, but declined to hear oral argument on the new issues raised in the supplemental briefing.

New counsel raised the three issues presented in this Petition: (1) whether any authority exists to permit a court to vacate a guilty plea in the absence of a specific request by the defendant; (2) whether jeopardy attached at the time of Petitioner's plea and the acceptance of it; and (3) whether the government was bound by commitments and promises in the plea agreement even though the Court eventually did not accept the agreement. Petitioner's CA Supplemental Brief, Supplemental Reply Brief, Petition for Rehearing. Throughout the arguments, Petitioner emphasized the difference between a Court's acceptance of a *plea* and its acceptance of a *plea agreement* and the dangers inherent in confusing those two very different concepts.

The Seventh Circuit affirmed, devoting only a single paragraph to these important issues and relying on little stated authority:

> *A. Authority to Vacate Guilty Plea*
>
> Gibson argues that on his original direct appeal from his guilty plea, we should have vacated his sentence, but upheld his guilty plea. This would limit Gibson's sentence to the five-year statutory maximum. We considered and rejected this argument the first time Gibson raised it. *Gibson I*, 356 F.3d at 765. Gibson's guilty plea was entered and accepted prior to the effective date of the

> 2002 amended FED. R. CRIM. P. 11 under subsection (e)(1)(C). In *Gibson I* we stated: "[B]ecause the plea agreement entered into by Gibson and the government contained explicit provisions regarding the exact term of imprisonment, Gibson can only attack the validity of the entire plea agreement." 356 F.3d at 765. We cannot preserve a plea under Rule 11(e)(1)(C) but dispose of the sentence. Id. at 765 (citing *United States v. Barnes*, 83 F.3d 934, 931 (7th Cir. 1996); *United States v. Peterson*, 268 F.3d 533, 534 (7th Cir. 2001)). Gibson alternatively requested that we void the entire agreement and remand for further proceedings. We did so, and Gibson has given us no reason to reconsider that decision.

App. 5-6 (footnote omitted).

It is to be noted that at no time has any court, on the record and in open court, advised the Petitioner that the plea agreement would be or has been rejected and afforded *him* the opportunity to withdraw the plea. This is the only avenue, under either version of Rule 11, any statute or case law that a plea may be vacated.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's statements of law, whether explicit or implied, in its opinion creates a conflict among the circuits and with this Court's precedential cases with respect to each of the three questions presented in this Petition. The overwhelming majority

of criminal cases are resolved by entry of guilty pleas. These questions are thus extremely important and resolution of the questions by this Court is equally important. Such resolution will not only aid the lower courts, but will also provide necessary guidance to prosecuting attorneys, defendants and defense counsel with respect to the negotiation and consequences of plea agreements. By providing this aid and guidance, this Court will ensure these endeavors reach a more just and consistent result.

1. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A COURT HAS ANY AUTHORITY TO VACATE A GUILTY PLEA WITHOUT AN EXPRESS REQUEST BY THE DEFENDANT.

The Seventh Circuit's conclusion that it could not "preserve a plea but dispose of a sentence" is in direct conflict with that of the Ninth Circuit in *In re Ellis*, 356 F.3d 1198, 1207 (9th Cir. 2004) (en banc), and *United States v. Patterson*, 381 F.3d 859, 865 (9th Cir. 2004), and with the Second Circuit in *United States v. Lopez*, 385 F.3d 245, 251-52 (2nd Cir. 2004).

By the terms of the version of Rule 11 in effect at the time of the original plea, if a district court determines that it will not accept the terms of a binding plea agreement, it must offer the defendant the opportunity to withdraw the plea. Nowhere in Rule 11 or in any other provision of the law is the authority granted to a court to sua sponte vacate a plea.

Ellis, 356 F.3d at 1207. "The only course available for the district court, upon rejecting the plea agreement, is to advise the defendant of his rights, including the right to withdraw the guilty plea." *Id.* A district court may accept a guilty plea and defer acceptance of the plea agreement, but "it is not free to vacate the plea either on the government's motion or sua sponte." *Patterson*, 381 F.3d at 865.

The Supreme Court has emphasized the distinction between *pleas* and *plea agreements* and the need to treat them distinctly. *See United States v. Hyde*, 520 U.S. 670, 674 (1997) ("Guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time.") The Second Circuit also is in accord that a defendant has the option of maintaining his guilty plea if the Court rejects the plea agreement. *Lopez*, 385 F.3d at 251-53 & n.13 (2nd Cir. 2004) (defendant with a binding sentence agreement "always has the option of keeping his guilty plea intact in the event that his agreement is rejected by the district court").

The Seventh Circuit's analysis and result was thus based on the erroneous conclusions that pleas and plea agreements must be accepted or rejected together and that a rejection of a binding sentencing agreement requires vacating a plea.

The Seventh Circuit also ignored its own case law that would have led to a conclusion that it could not vacate the plea. In *United States v. Ritsema*, 89 F.3d 392 (7th Cir. 1996), the Court considered the

question of whether a district court had the authority to reject a plea agreement once it had been accepted, concluding it did not. The Court reversed the conviction on a reinstated count and remanded for sentencing on the sole count that was the subject of the original plea. If a Court has no authority to reject a plea agreement once it has been accepted, *a fortiori*, it has no authority to reject a guilty plea once it has been accepted.

In this case, as in *Ellis* and *Patterson*, the District Court conducted a careful plea hearing and after satisfying the preliminary requirements of Rule 11, the District Court accepted the plea and entered a judgment of conviction thereon, while deferring acceptance of the plea agreement. The District Court perhaps could have deferred acceptance of the guilty plea along with deferring acceptance of the plea agreement, but it did not. Thus, it would have been without authority to sua sponte vacate the plea even if had later discovered the error of law in the plea agreement.

Because a District Court does not have the authority to vacate a guilty plea in the absence of a defendant's motion, whether it would do so *sua sponte* or on motion by the government, it follows that a Court of Appeals would not have the authority to vacate a guilty plea. Upon determining that the sentence imposed on the guilty plea was in violation of the law, the case should have been remanded for proceedings to offer Petitioner, and he alone, the option of withdrawing the plea. If Petitioner had

persisted in the plea, the only course would have been to sentence within the five year maximum.

The Seventh Circuit's assertion that Petitioner in *Gibson I*, "alternatively requested that we void the entire agreement and remand for further proceedings" does not change the analysis. At no point did Petitioner seek to have his *plea* vacated, a decision that he, and he alone, controlled. The erroneous conclusions of the Seventh Circuit rest, as stated earlier, on a repeated and ongoing foundation, and a false one, that a plea and plea agreement must be accepted or rejected together.

A mutual mistake of law does not affect the contractual nature of a plea agreement and the enforceable nature of promises contained therein. *See infra*, pp. 22-29. In *Brady v. United States*, 397 U.S. 742 (1970), this Court was confronted with a mistake of law arrived at by a different route than the one here. In *Brady*, the petitioner sought to withdraw his guilty plea to murder. This Court had declared the death penalty unconstitutional after the petitioner had entered his plea. *Brady* held that the plea must stand, despite the fact that the petitioner had entered the plea to avoid the death penalty. The fact that petitioner and his counsel, and presumably the prosecutor with whom the plea was negotiated, were "mistaken" that the death penalty was constitutionally permissible did not affect the validity or the finality of the plea.

The mistake here was not one created by judicial intervention, but rather one resulting from misreading the clear language of the statute. If a defendant cannot withdraw a plea when an error is only discoverable after the entry of the plea, as in *Brady*, certainly the plea cannot be set aside without a defendant's request based on a prosecutor's and district court's failure to read the clear language of a statute.

The Opinion in *Gibson I* remanded for further proceedings. The only "further" proceedings available to the District Court under the dictates of Rule 11 as explained by *Ellis* and *Patterson*, would be limited to the proceedings described *supra*, i.e., to allow only Petitioner the option of withdrawing his plea. In the absence of his election to do so, the Seventh Circuit's holding ignored Rule 11, *Ellis*, *Patterson*, and *Lopez*, as well as it own case law, thus creating a conflict that this Court must resolve. The Seventh Circuit's conclusion that a court must vacate a plea if it rejects a plea agreement also ignores and conflicts with the lesson of *Hyde* that pleas and plea agreements are separate entities and a plea may be accepted while a plea agreement is rejected. The Court erred in *Gibson I* and compounded the error in *Gibson II*.

This Petition should be granted so this Court can resolve the conflict among the Circuits and ensure that principles enunciated in *Hyde* are followed by the lower courts.

2. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER JEOPARDY ATTACHES AT THE TIME OF ENTRY OF A GUILTY PLEA AND WHETHER SUCH ATTACHMENT OF JEOPARDY BARS, UNDER PRINCIPLES OF DOUBLE JEOPARDY, REINSTATEMENT OF COUNTS DISMISSED AS A RESULT OF THE PLEA, THUS PROVIDING LOWER COURTS WITH GUIDANCE AS TO THE LIMITS OF *OHIO v. JOHNSON*, 467 U.S. 493 (1984).

The Seventh Circuit did not address the double jeopardy issue or the underlying issue of whether jeopardy had attached at the time of the acceptance of Petitioner's plea of guilty. Even though not directly addressing the issue, the Court implicitly held that jeopardy did not attach, because retrial on the charge to which Petitioner pled and the other charges would have otherwise been an obvious double jeopardy violation. This holding is in direct conflict with *Patterson* and other circuits' cases and requires reading the conclusions of *Ohio v. Johnson*, 467 U.S. 493 (1984), out of context.

It is to be noted again that this is not a case in which jeopardy was extinguished by a defendant's express request, after proper advice in open court, to withdraw a guilty plea.

The Seventh Circuit did not address *Patterson*, which is directly on point and which held that jeopardy attaches at the time a guilty plea is accepted. *Patterson*, 381 F.3d at 854. Other Circuits have also concluded that jeopardy attaches on the entry and

acceptance of a guilty plea. *United States v. Aliotta*, 199 F.3d 78, 83 (2d Cir. 1999) ("As a general rule, jeopardy attaches in a criminal case at the time the district court accepts the defendant's guilty plea"); *United States v. Cambindo Valencia*, 609 F.2d 603, 637 (2d Cir. 1979) ("it is axiomatic of the double jeopardy clause that jeopardy attached once Jesus's guilty plea was accepted) (citing *United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978); *United States v. Williams*, 534 F.2d 119, 120 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976); *United States v. Young*, 503 F.2d 1072, 1074 n.5 (3d Cir. 1974); *United States v. Jerry*, 487 F.2d 600, 606 (3d Cir. 1973)); *United States v. Bond*, 87 F.3d 695, 699 (5th Cir. 1996) ("[J]eopardy attaches in [a] criminal action at the time [the] guilty plea is accepted by the court") (quoting *United States v. Wong*, 62 F.3d 1212, 1214 (9th Cir. 1995) and *United States v. Alt*, 83 F.3d 779, 781 (6th Cir. 1996) (jeopardy attaches when court accepts guilty plea) (in turn citing *United States v. Ursery*, 59 F.3d 568, 572 (6th Cir. 1995), *cert. granted*, 516 U.S. 1070 (1996), and *reversed on other grounds*, 518 U.S. 267 (1996))).

Again the Seventh Circuit's conclusion is in conflict with its own caselaw. "A defendant is considered to be convicted by the entry of his plea of guilty just as if a jury had found a verdict of guilty against him, and *jeopardy therefore attaches with acceptance of his guilty plea.*" *Dawson v. United States*, 77 F.3d 180, 182 (7th Cir. 1996) (emphasis added) (quoting *United States ex rel. Stevens v. Circuit Ct. of Milwaukee*

County, Wis., Branch VIII, 675 F.2d 946, 948 (7th Cir. 1982).

The appeal in *Dawson*, as in *Bond*, *Alt*, and *Ursery*, *supra*, followed the Supreme Court's decisions in which it held that extreme civil penalties could amount to excessive punishment under the Eighth Amendment and that a civil penalty can be so extreme as to constitute a punishment for double jeopardy purposes. *See Austin v. United States*, 509 U.S. 602 (1993) (holding that a civil penalty can be so extreme as to violate the Eighth Amendment), and *United States v. Halper*, 490 U.S. 435 (1989) (holding that a civil penalty can be so extreme as to constitute a punishment for double jeopardy purposes).

In *Dawson*, the Seventh Circuit affirmed the District Court's denial of a 2255 motion seeking to vacate the defendant's sentence because he had been subject to criminal forfeiture. The decision first determined the relevant dates of the proceedings in the District Court. In January 1993, the defendant in that case began simultaneous settlement negotiations for both civil forfeiture and criminal actions against him; he entered a guilty plea on January 13, 1993, to the criminal charges and signed a stipulated judgment of forfeiture in the civil forfeiture case. The judgment of forfeiture was filed with the district court on that day and was entered as a final judgment on January 22, 1993. He was sentenced in the criminal matter on October 8, 1993.

In *Dawson*, the Court held that if the criminal conviction came after the civil judgment, double jeopardy might be implicated, but that was not what had happened. The Court found jeopardy attached at the time of the guilty plea and thus was before the civil judgment, noting that the defendant could perhaps attack the civil judgment. The Court rejected the defendant's argument that jeopardy attached for purposes of multiple trials with the plea, but for purposes of multiple punishments with the sentence. *Dawson*, 77 F.3d at 182.

Dawson's holding that jeopardy attaches when a plea is accepted remains good law in the Seventh Circuit. Thus, Petitioner was placed in jeopardy when he entered the plea and it was accepted. Because that jeopardy could be extinguished only by *his* withdrawal of the plea, not by *sua sponte* action by the Court, the renewal of the charges dismissed as a result of the plea agreement did constitute a violation of double jeopardy principles.

Because the Seventh Circuit did not address the double jeopardy issue and when jeopardy attaches in a guilty plea, its precise reasoning is unclear. A clue may be found in the Ninth Circuit's Order denying the government's petition for rehearing and rehearing *en banc* following the panel's rehearing in *Patterson*. Judge Kozinski, writing in dissent of the denial, cited extensively this Court's holding in *Ohio v. Johnson*, 467 U.S. 493 (1984). *United States v. Patterson*, 406 F.3d 1095, 1096-98 (9th Cir. 2005) (Kozinski, C.J., dissenting). *Johnson*, did in fact, hold that jeopardy

does not always attach at the acceptance of a guilty plea, as Judge Kozinski asserted.

What the dissent in *Patterson* and others who rely on *Johnson* ignore is the very unique procedural history of that case. The defendant there was charged with four offenses and entered a plea, over the strenuous objection of the government, to two of the lesser charges. The District Court then dismissed the remaining counts.

The Supreme Court held the dismissal was inappropriate and trial on the two remaining counts would not violate double jeopardy because jeopardy does not always attach at the entry and acceptance of a guilty plea. That holding must be analyzed in light of the very unique situation of the case and the reasoning of the Court. Jeopardy did not attach, according to *Johnson*, because the State would be denied its right to "one full and fair opportunity to convict those who have violated its laws." *Johnson*, 467 U.S. at 502.

The government here had its full and fair opportunity. It used that opportunity to offer Petitioner the chance to plea and that offer was accepted. The fact that the government, in the persons of the United States Attorney's Office, the entity responsible for enforcement of criminal laws, made a mistake based on its ignorance of those very laws in no way places this case in the same unique situation of *Johnson*. Assuming *arguendo* that the government has some unalterable right to a full and fair opportunity to

convict those who have violated the law, once it has had that opportunity as it did here, it does not have the right to the result it wants and to reject its own decisions when that result is unavailable.

Any assertion that reinstating the charges did not constitute double jeopardy because the charges of mail fraud, wire fraud, and conspiracy to commit money laundering are distinct from section 371 conspiracy, is negated by the fact that double jeopardy also embraces the notions of collateral estoppal, including issue preclusion and claim preclusion. "The Double Jeopardy Clause has been held to embrace principles of issue preclusion, such that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *United States v. Brocksmith*, 991 F.2d 1363, 1367, *cert. denied*, 510 U.S. 999 (1993) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)); *United States v. Bailin*, 977 F.2d 270, 273-74 (7th Cir. 1992). *See, also, Johnson*, 476 U.S. at 501 ("we have recognized that the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense") (citing *Brown v. Ohio*, 432 U.S. 161 (1977).

Petitioner's subsequent trial and conviction on the counts not included in his guilty plea were thus in violation of his double jeopardy rights. This Court must resolve the conflict among the circuits by clarifying *Johnson* and *Brown* with respect to when

jeopardy attaches with respect to a guilty plea, thus providing greater guidance to lower courts to avoid future errors.

3. THIS COURT SHOULD RESOLVE THE CONFLICT CONCERNING THE IMPORTANT QUESTION WHETHER CONTRACT PRINCIPLES AND DUE PROCESS CONSIDERATIONS REQUIRE THE GOVERNMENT TO HONOR PROMISES AND COMMITMENTS MADE IN THE PLEA AGREEMENT.

Petitioner's argument that despite the rejection of the plea agreement by the courts and the improper vacating of the plea, the government was bound by its promises in the plea agreement also was ignored, but implicitly rejected, by the Seventh Circuit. By the terms of the plea agreement, the government agreed to prosecute Petitioner for no other crimes than the one to which he was pleading guilty. Plea agreements are, of course, contracts between the government and the defendant. Despite any rejection by the Courts of a plea agreement, that contract between the parties is not diminished. That is the lesson to be learned from *Patterson*. *See supra*. In addition to the logical conclusions to be drawn from *Patterson*, *Ellis*, and *Lopez*, among other cases, the Seventh Circuit's conclusions, are in direct conflict with *United States v. Transfiguracion*, 442 F.3d 1222 (9th Cir. 2006), and universally accepted principles relating to enforcement of plea agreements as evidenced by its own case law.

The Seventh Circuit has held:

> "[P]lea agreements are contracts, and their content and meaning are determined according to ordinary contract principles." *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992). "[T]o insure the integrity of the plea bargaining process, the 'most meticulous standards of both promise and performance must be met by the government.'" *United States v. Jimenez*, 992 F.2d 131, 134 (7th Cir. 1993) (quoting *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978)). "The government must fulfill any promise that it expressly or impliedly makes in exchange for a defendant's guilty plea." *Ingram*, 979 F.2d at 1184 (citing *Santobello v. New York*, 404 U.S. 257 (1971)). "[T]he strict fulfilment of prosecutorial promises emanates as a requirement from the significant consequences of a guilty plea." *United States v. Ataya*, 864 F.2d 1324, 1330 (7th Cir. 1988) (internal quotations and citations omitted). However, "[w]e review the language of the plea agreement objectively and hold the government to the literal terms of the plea agreement." *United States v. Williams*, 102 F.3d 923, 927 (7th Cir. 1996). To make a determination as to breach, we "must examine whether there has been a substantial breach of the plea agreement, in light of the parties' reasonable expectations upon entering the agreement." *[United States v.] Schilling*, 142 F.3d at 395 (internal quotations and citations omitted).

United States v. Atkinson, 259 F.3d 648, 654 (7th Cir. 2001).

With respect to the charges that the government agreed to dismiss, i.e., those crimes for which Petitioner would not be prosecuted, it was his reasonable expectation that he would not face prosecution for them if he entered a plea of guilty. He did so and at no time did he withdraw the plea. When the government moved for reinstatement of the dismissed counts, it materially breached the plea agreement.

Petitioner's first appeal was in accordance with the plea agreement, i.e., he had a right under the agreement to appeal a sentence imposed in violation of a statutory maximum. That is all he did. He did not seek or authorize a vacating of the validly entered and validly accepted plea.

Petitioner did not breach his agreement. He entered a guilty plea and appealed the illegal sentence. He had the right to expect and demand that the government honor its commitments under the plea agreement.

The question then is whether the mutual mistake of law, i.e., the agreement to jointly recommend a sentence in excess of the statutory maximum, makes the plea agreement itself unenforceable. The answer is that is does not. First, the mistake did not preclude performance of any of the promises made in the plea agreement, promises that Petitioner adhered to, including, through counsel, recommending the statutorily prohibited sentence, while at the same time reserving his right to appeal such a sentence imposed

in violation of the law. The terms of the plea agreement can be abided by, and with the most notable exception of the government's breach by moving to reinstate counts, have been.

As a matter of law, the parties' mutual mistake of law does not extinguish Petitioner's enforceable rights under the agreement. Plea agreements are to be interpreted and enforced according to contract principles. *Atkinson*, 259 F.3d at 654. In earlier times, a mistake of law in a contract could void the contract, but generally accepted contract principles no longer make a contract void because of such a mistake. *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663 (7th Cir. 2001).

In that case, the issue was whether payments voluntarily made without legal requirement could be recovered. Noting that the voluntary payment doctrine was a corollary to the mistake of law doctrine, the Court stated:

> Indeed, English law at one time recognized in its chancery courts the general rule that relief would be granted for both mistakes of fact or law. In the early nineteenth century, however, the English courts and, soon thereafter, American tribunals began to acknowledge that recovery ought not be premised on a mistake of law made with full knowledge of the facts. The voluntary payment doctrine is a corollary to the mistake of law doctrine and, in its general formulation, holds that a person who voluntarily pays another with

> full knowledge of the facts will not be entitled to restitution.

Id. at 667 (emphasis added) (citations omitted).

Thus, under contract principles a mutual mistake of law made with full knowledge of the facts is not something for which a party has legal recourse for a remedy. These guiding principles take on added meaning when, as here, the party, i.e., the government, seeking relief from its obligations under the plea agreement based on a mistake of law is the very entity who should be the last to be afforded such relief, given that the government agency involved is charged with the enforcement of the law at issue. Ignorance of the law is no defense for an ordinary citizen. Ignorance of the law should not and cannot allow the government to avoid its promised performance.

In a very similar case, the Ninth Circuit rejected the government's attempts to avoid the consequences of mistakes in a plea agreement. *Transfiguracion*, 442 F.3d 1222, 1228-30 (9th Cir. 2006) (citing *United States v. Barron*, 172 F.3d 1153, 1158 (9th Cir. 1999) (en banc)). In *Transfiguracion* the defendant pled to importing 100 grams of methamphetamine hydrochloride into the United States. The plea agreement included the government's promise to dismiss other counts and to bring no further charges. While the case was still pending, the Ninth Circuit decided in *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003) (en banc), that importation from Guam did not

violate the specific statute because the statute did not embrace the transportation of drugs between two domestic locations within the United States, even if the travel included a flight through international airspace. The government contended that it was entitled to rescind the plea agreement because of the mutual mistake of law. The Ninth Circuit rejected the argument and held that not only was it necessary to dismiss the superseding information to which the defendant pled, the government could not reinstate charges from the underlying indictment. 442 F.3d at 1228-30.

In reaching this decision the Court concluded that because "a defendant's liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made, so that the government gets what it bargains for but nothing more." 442 F.3d at 1228. The *Transfiguracion* court cited an earlier decision, *United States v. Barron*, 172 F.3d 1153, 1158 (9th Cir. 1999) (en banc). In *Barron*, a defendant had pled guilty to possession of a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). This Court subsequently held in *Bailey v. United States*, 516 U.S. 137 (1995), that mere possession was insufficient for a conviction. The Ninth Circuit held that the subsequent § 2255 motion did not breach the plea agreement and rejected the government's attempt to rescind the agreement. *Cf. Brady v. United States*, 397 U.S. 742 (1970) (holding defendant could not withdraw his guilty plea to

murder after this Court found the death penalty unconstitutional).

The Court also discussed cases in which it had refused a remedy to defendants who had entered a plea under a mutual mistake of law. *Id.* at 1229. In *United States v. Zweber*, 913 F.2d 705 (1990), the Court held that a mutual mistake concerning the application of the Federal Sentencing Guidelines did not permit defendants to withdraw their plea or rescind the plea agreement.

The mutual mistake of law in both *Barron* and *Transfiguracion* was a result of later judicial intervention which had overruled previous *interpretations* of the law. The principles of those cases apply with even greater force when, as here, the statute defining the count to which Petitioner pled guilty clearly establishes the maximum penalty. If a defendant cannot rescind a plea agreement, as was precluded in *Zweber*, certainly the government cannot rescind the agreement here when those responsible for the government entering into the agreement were the individuals, who perhaps more than anyone else, *should have known what the law is.* Failure to require the government to satisfy its requirements under the plea agreement not only constitutes an injustice with respect to Petitioner, it also constitutes an injustice with respect to what every citizen has a right to expect from those charged with enforcing the laws of our nation.

The mutual mistake of law does not excuse the government from its obligations under the agreement. It got what it bargained for, i.e., Petitioner's guilty plea. This Court must resolve this third conflict created by the Seventh Circuit's decision in order to ensure proper adherence to plea agreements.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted and the Seventh Circuit should be reversed.

Respectfully submitted,

GERALD R. SMITH
Counsel of Record
LAW OFFICES OF GERALD R. SMITH
505 W. Riverside, Suite 215
Spokane, WA 99201
Telephone: (509) 252-5051

In the
United States Court of Appeals
for the Seventh Circuit

No. 05-4327

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES R. GIBSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 01 CR 30005 – **J. Phil Gilbert**, *Judge*.

ARGUED FEBRUARY 23, 2007[1] – DECIDED JUNE 19, 2007

Before POSNER, KANNE, and ROVNER, Circuit Judges.

KANNE, *Circuit Judge*. After a flight from justice and a botched plea agreement, a jury convicted James Gibson of one count of conspiracy to commit mail and

---

[1] An opinion in this case was issued on March 16, 2007 and a judgment was entered. The court, on its own motion, withdrew the opinion and on March 19, 2007, the judgment was vacated to allow time for supplemental briefing.

wire fraud in violation of 18 U.S.C. § 371, three counts of mail fraud in violation of 18 U.S.C. § 1341, two counts of wire fraud in violation of 18 U.S.C. § 1343, one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), and one count setting forth forfeiture allegations pursuant to 18 U.S.C. § 982. Gibson was sentenced to 480 months' imprisonment. Over Gibson's arguments, the district court determined that the statute of limitations had not run on any of the charges against him due to his flight from justice and the subsequent passage of 18 U.S.C. § 3296 allowing for the reinstatement of charges dismissed pursuant to a plea agreement. We affirm.

I. BACKGROUND

Gibson was the owner and president of SBU, Inc. and several other companies in and around St. Louis, Missouri. SBU arranged tax-advantaged structured settlements in personal injury cases. Gibson told his clients that their structured settlements would be funded with United States Treasury obligations, such as Treasury Bonds, which would be transferred to a third-party trustee and held in irrevocable and segregated trusts for each client's sole benefit. The clients would receive periodic payments from the interest and proceeds from the redemption of these Treasury obligations. SBU's clients arranged for their personal injury settlement funds to be sent directly to Gibson personally.

After a period of legitimate operation, Gibson stopped buying Treasury obligations with his clients' settlement funds. Instead he spent $16,856,000 of his clients' money on unauthorized business transactions, high risk investments, and purchases of real estate and luxury items for his own use. Gibson then began redeeming the Treasury obligations he had already purchased for his clients and likewise spending the proceeds for himself. The total loss to Gibson's clients was $156,194,810.92, many of whom needed the money to support themselves and fund necessary medical treatment.

Gibson's attorney informed him that he was under investigation for his management of client funds. He and his wife set sail to Belize and wired $3,478,352 of his client's trust funds to Belize bank accounts. They returned briefly to the United States, but departed for Belize again in July 1999.

On January 18, 2001, Gibson was charged in a suppressed indictment with: one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371, three counts of mail fraud in violation of 18 U.S.C. § 1341, two counts of wire fraud in violation of 18 U.S.C. § 1343, one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), and one count setting forth forfeiture allegations in violation of 18 U.S.C. § 982. Gibson was arrested in Belize on May 10, 2001 and returned to the United States. The indictment was unsealed on May 10, 2001 as a result of Gibson's arrest. A superseding indictment

was returned on October 18, 2001, adding Gibson's wife as a defendant.

On January 8, 2002, Gibson pled guilty to one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371. Pursuant to a plea agreement, the government dismissed the remaining seven counts and Gibson was sentenced to 262 months' imprisonment. Unfortunately, this plea agreement was based on the erroneous belief (by all involved) that the maximum statutory sentence under § 371 was thirty years' imprisonment. In reality, the maximum sentence was just five years' imprisonment. Gibson appealed, and this court vacated his guilty plea, conviction, and sentence and remanded to the district court for further proceedings. *United States v. Gibson*, 356 F.3d 761, 767 (7th Cir. 2004) (*Gibson I*).

This court's mandate was entered on February 26, 2004. Under 18 U.S.C. § 3296, the government then had sixty days to move to reinstate the counts of the indictment that were dismissed pursuant to the plea agreement. The government so moved on March 26, 2004 and the charges were reinstated on July 14, 2005.[2]

---

[2] Gibson's case was originally assigned to Chief Judge Murphy in the district court. Judge Murphy was forced to recuse himself after Gibson made a credible threat that he would have Judge Murphy killed. R. 382. Gibson also fired several appointed counsel and eventually decided to proceed *pro se*. Judge Murphy's recusal, Gibson's numerous counsel, and a variety of pretrial motions delayed the reinstatement of the charges.

Prior to trial, Gibson moved the district court to reconsider its ruling permitting the government to reinstate all of the counts in the indictment that had been dismissed pursuant to his plea agreement. He argued that the five year statute of limitations had run on the allegations contained in Counts two, three, and five of the indictment. The earliest of the charged conduct, contained in Count five, occurred on June 6, 1996. The district court held that the statute of limitations was tolled during the twenty-two months that Gibson was hiding in Belize, and that 18 U.S.C. § 3296 was passed before the newly calculated limitations date, allowing for reinstatement of the charges.

Gibson was tried by a jury and convicted of all counts on the indictment. He was sentenced to 480 months' imprisonment and three years' supervised release, and was ordered to pay a special assessment of $700 and restitution in the amount of $83,282,767.42.

II. Analysis

Gibson raises two issues on appeal: (1) whether this court had the authority to vacate his guilty plea on his first direct appeal; and (2) whether Counts two, three, and five of the indictment were properly reinstated.

A. Authority to Vacate Guilty Plea

Gibson argues that on his original direct appeal from his guilty plea, we should have vacated his

sentence, but upheld his guilty plea. This would limit Gibson's sentence to the five-year statutory maximum. We considered and rejected this argument the first time Gibson raised it. *Gibson I*, 356 F.3d at 765. Gibson's guilty plea was entered and accepted prior to the effective date of the 2002 amended FED. R. CRIM. P. 11 under subsection (e)(1)(C).[3] In *Gibson I* we stated: "[B]ecause the plea agreement entered into by Gibson and the government contained explicit provisions regarding the exact term of imprisonment, Gibson can only attack the validity of the entire plea agreement." 356 F.3d at 765. We cannot preserve a plea under Rule 11(e)(1)(C) but dispose of the sentence. *Id.* at 765 (citing *United States v. Barnes*, 83 F.3d 934, 931 (7th Cir. 1996); *United States v. Peterson*, 268 F.3d 533, 534 (7th Cir. 2001)). Gibson alternatively requested that we void the entire agreement and remand for further proceedings. We did so, and Gibson has given us no reason to reconsider that decision.

B. Reinstatement of Charges

Gibson next argues that Counts two, three, and five of the indictment were improperly reinstated on July 14, 2005 because the five-year statute of limitations had already run. We review the district court's ruling regarding the statute of limitations *de novo*. *United States v. Daniels*, 387 F.3d 636, 641 (7th Cir.

[3] Now embodied in FED. R. CRIM. P. 11(c)(1)(C).

2004); *United States v. Pearson*, 340 F.3d 459, 464 (7th Cir. 2003), *vacated on other grounds, sub nom. Hawkins v. United States*, 543 U.S. 1097 (2005).

The first step in our analysis is to calculate the bar date, which requires us to determine whether any tolling provisions apply. "No statute of limitations shall extend to any person fleeing from justice." 18 U.S.C. § 3290. The statute of limitations and its tolling provisions are designed to allow the government time to investigate crimes while protecting individuals from defending against charges for distant offenses. *United States v. Marshall*, 856 F.2d 896, 899-900 (7th Cir. 1988). Section 3290 "reflects the congressional belief that where the defendant impedes the discovery and prosecution of his criminal conduct by 'fleeing from justice,' his right to avoid prosecution for distant offenses is diminished while the government's need for additional discovery time is strengthened." *Id.* at 900. In order for § 3290 to toll the statute of limitations while the defendant has fled, the government must prove by a preponderance of the evidence that the defendant fled with the intent to avoid arrest or prosecution. *Id.*; *see also United States v. Elliott*, 467 F.3d 688, 690 (7th Cir. 2006).

The government has more than met its burden on this issue. Gibson admitted to federal agents that his attorney informed him that he was under investigation prior to his departure and indicated that he left in anticipation of criminal charges. Gibson set up Belize corporations to hide his assets and gave no

legitimate purpose for doing so. His wife testified that they had discussed the possibility of criminal liability for their use of the trust money and that they were concerned that they may be arrested upon their departure from the United States in July 1999.

Because the date of the earliest conduct charged in the indictment was June 6, 1996, we will use that date to illustrate the limitations analysis. Under 18 U.S.C. § 3282, the statute of limitations for non-capital offenses is five years. Accounting for the twenty-two months during which the statute was tolled due to Gibson's flight to Belize, the new bar date was in April 2003. After this court vacated Gibson's guilty plea, the government did not move for reinstatement of the charges against him until March 26, 2004. If this were the end of the story, the charges against Gibson in Counts two, three, and five of the indictment would not be timely. However, this is not the end of the story.

The second step in our analysis is to determine whether reinstatement of the charges was proper notwithstanding the statute of limitations. On November 2, 2002, 18 U.S.C. § 3296 became effective, allowing for reinstatement of the counts of an indictment when: "(1) the counts sought to be reinstated were originally filed within the applicable limitations period; (2) the counts were dismissed pursuant to a plea agreement approved by the district court under which the defendant pled guilty to other charges; (3) the guilty plea was subsequently vacated on the motion of the defendant; and (4) the United States

moves to reinstate the dismissed counts within 60 days of the date on which the order vacating the plea becomes final." 18 U.S.C. § 3296(a).

Gibson does not argue that any of § 3296's requirements are not met, only that because the section was not in place at the time he committed the crimes, its application in this case would be impermissibly *ex post facto*. But it is well settled law that applying procedural statutes such as 18 U.S.C. § 3296, which effectively enlarges the limitations period, does not violate the *ex post facto* clause so long as the statute is passed before the given prosecution is barred. *Stogner v. California*, 539 U.S. 607, 618 (2003); *United States v. Elrod*, 682 F.2d 688, 689 (7th Cir. 1982). Section 3296 was passed in November 2002, at least five months before the earliest bar date for any of Gibson's offenses after accounting for his flight from justice. Application of 18 U.S.C. § 3296 was not *ex post facto*, and counts two, three, and five of the indictment were thus properly reinstated.

III. Conclusion

Gibson's original guilty plea was properly vacated along with his sentence in 2004. Through application of 18 U.S.C. §§ 3290 and 3296 to Gibson's flight to Belize and vacated guilty plea, the charges reinstated against him in 2005 for the offenses he committed in 1996 were timely notwithstanding the five-year statute of limitations. The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court
of Appeals for the Seventh Circuit

In the
United States Court of Appeals
for the Seventh Circuit

UNITED STATES of America, Plaintiff-Appellee,

v.

James R. GIBSON, Defendant-Appellant.
No. 02-2051.

Argued Sept. 15, 2003.
Decided Jan. 28, 2004.

Before POSNER, KANNE, and ROVNER, Circuit Judges.

KANNE, Circuit Judge.

After the entry of a guilty plea by James R. Gibson pursuant to the former Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure,[1] the district court accepted the plea agreement and thereby agreed to the sentence specified in the agreement. Gibson received – and is currently serving – the precise term of imprisonment he bargained for, but he now seeks to invalidate the sentence and plea agreement. Gibson's indictment included eight counts, five of which (any of three counts of Mail Fraud or two counts of Wire Fraud) would have provided a legal basis for the 262-month prison sentence agreed to by Gibson. However, as we discuss below, the single count to which Gibson pled guilty, Conspiracy under

[1] The plea agreement was entered and accepted prior to the effective date-December 2002-of amended Rule 11.

18 U.S.C. § 371, has a statutory maximum sentence of five years and therefore does not allow the 262-month sentence stipulated to in the plea agreement. Because the sentence exceeds the maximum term of imprisonment of the statute of conviction, we must vacate the sentence, conviction, guilty plea, and the court's acceptance thereof.

I. History

Gibson's criminal indictment stemmed from his activities as owner and president of SBU, Inc. and several affiliated companies. The companies were operated by Gibson in the St. Louis, Chicago, and West Palm Beach areas. SBU offered tax-advantaged structured settlements to personal-injury plaintiffs. Gibson marketed SBU by representing to personal-injury victims that he would use their settlement money to purchase United States Treasury Bonds and hold these bonds in trust for the victims. Gibson promised to make periodic payments to the victims from the proceeds of the investments. Some of the settlement funds were placed with legitimate trust companies and funded with bonds.

Gibson transferred all of the trust accounts to Flag Finance Corporation, another corporation wholly owned and operated by Gibson. Gibson stopped purchasing Treasury obligations for most of the trusts and instead used new settlement proceeds and bond proceeds in his own unauthorized business transactions, high-risk investments (including the operation

of a chain of grocery stores that eventually sought bankruptcy protection), and the purchase of real estate and personal luxury items. The total loss to the individual victims in this case was $156,256,316.92.

In July 1999, Gibson and his wife received a grand jury subpoena. They attempted to avoid the investigation by fleeing to Central America, but were eventually arrested and returned to the United States. On October 18, 2001, a grand jury returned an eight-count indictment against Gibson.

Gibson was charged with Conspiracy to Commit Mail and Wire Fraud in violation of 18 U.S.C. § 371 (Count 1); Mail Fraud on August 20, 1996, in violation of 18 U.S.C. § 1341 (Count 2); Mail Fraud on September 17, 1996 (Count 3); Mail Fraud on January 27, 1998 (Count 4); Wire Fraud on June 6, 1996, in violation of 18 U.S.C. § 1343 (Count 5); Wire Fraud on January 7, 1998 (Count 6); Conspiracy to Commit Money Laundering in violation of 18 U.S.C. § 956(h) (Count 7); and a Forfeiture allegation pursuant to 18 U.S.C. § 982 (Count 8).

Gibson's trial commenced on January 7, 2002. On January 8, before the jury was sworn, Gibson came to an agreement with the government, quoted below in relevant part:

> 1. The Defendant will enter a plea of guilty to count one of the Superseding Indictment charging a violation of Title 18, United States Code, Section 371, Conspiracy to Commit Mail and Wire Fraud which affects the

> safety and security of a financial institution. The maximum penalty that can be imposed for each violation of § 371 is 30 years' imprisonment or a $1,000,000 fine, or both, and at least 5 years supervised release.
>
> 2. The Defendant understands that he is entering a guilty plea whereby the Government and the Defendant have agreed, pursuant to 11(e)(1)(C), to a sentence of 262 months, the maximum fine of $250,000, and restitution in the amount of $66,000,000. . . . The court will determine the appropriate amount of supervised release.

(Def.'s Plea Agrmt. at 3-4) (emphasis added). The plea agreement mistakenly states that the maximum statutory sentence under 18 U.S.C. § 371 is thirty years. As noted earlier, the actual maximum statutory sentence is five years. In another part of the agreement, Gibson waived his right to appeal his sentence and acknowledged his waiver of the right to trial and his understanding of the charge set forth in the plea. The government promised not to prosecute Gibson in the Southern District of Illinois for any other crimes known at the time of the agreement.

The district judge conducted the requisite colloquy with Gibson after receiving this agreement. He advised Gibson as to the relevant provisions of Rule 11. The judge inquired into Gibson's age and education and informed him of the rights he was giving up by pleading guilty. The judge determined both that Gibson was competent and understood the nature of

the charge to which he was pleading guilty by describing the elements of the crime of Conspiracy to Commit Mail Fraud and Wire Fraud. Gibson informed the judge that he was cognizant of all the preceding information and affirmed that he willingly relinquished his rights. The district court accepted Gibson's guilty plea and deferred acceptance of the plea agreement until after review of the presentence report.

In due course, a Presentence Investigation Report ("PSR") was prepared by a probation officer. The PSR repeated the parties' mistake, first made in the plea agreement, that Count 1, "Conspiracy to Commit Mail and Wire Fraud 18 U.S.C. §§ 1341, 1343, and 371," carried a maximum sentence of thirty years.

The PSR calculated Gibson's sentencing range under the Federal Sentencing Guidelines based, not on 18 U.S.C. § 371 (Conspiracy), but on violation of 18 U.S.C. §§ 1341 (Mail Fraud) and 1343 (Wire Fraud). His offense level totaled 41 (a base offense level of 6, with numerous enhancements), his criminal history category was II, and his guideline range was therefore 360 months to life imprisonment. The PSR concluded that a prison sentence of 360 months was appropriate.

While accepting the findings of the PSR, the district judge determined that the Rule 11(e)(1)(C) plea agreement was acceptable in setting 262 months as the term of imprisonment. This departure from the Sentencing Guidelines in favor of Gibson was justified as

appropriate because of Gibson's age (57 at the time of sentencing), his cooperation in recovering some of the converted money after his apprehension, and the elimination of a need for a trial by Gibson's acceptance of responsibility.

Gibson, initially proceeding "pro se" on appeal, asserted legal error in his sentence, although that issue was never raised below at any point in the process.[2] It seems that, while coming to an agreement on the amount of prison time, supervised release, fines, and restitution, neither the government nor Gibson observed that Count One, Conspiracy to Commit Mail and Wire Fraud, carries a maximum statutory penalty of only five years. Had the parties substituted any one of Counts 2 through 6, a maximum statutory penalty of thirty years would have been applicable, as the offenses affected a financial institution. *See* 18 U.S.C. §§ 1341 and 1343. Unfortunately, the probation officer did not catch the parties' mistake and thus did not alert the district judge to the error.

Both parties now agree, however, that the sentence as it stands is illegal. Gibson asserts that we must vacate the sentence because it is illegal or, alternatively, because the misstatement of the law during the Rule 11 process led to an involuntary plea

---

[2] Gibson did object to several of the findings in the PSR, but never took issue with the finding that he was subject to a thirty-year statutory maximum sentence.

agreement. The government asserts that we do not have jurisdiction to review the sentence and that Gibson has waived review of his sentence; alternatively, the government requests that we affirm the sentence, in spite of the error.

II. Analysis

Before moving to an analysis of the merits, we must first ascertain whether we have the power to provide the relief requested by Gibson. We do not have the power to preserve a guilty plea under Fed.R.Crim.P. 11(e)(1)(C), yet "discard the sentence imposed by the district court." *United States v. Barnes*, 83 F.3d 934, 941 (7th Cir.1996). In other words, because the plea agreement entered into by Gibson and the government contained explicit provisions regarding the exact term of imprisonment, Gibson can only attack the validity of the entire plea agreement. He cannot seek to uphold the plea agreement, yet obtain relief in the form of a different sentence. *See United States v. Peterson*, 268 F.3d 533, 534 (7th Cir.2001). In essence, Gibson cannot hold out hope that we will order the district court to enforce the plea agreement and yet reduce his sentence to five years. To the extent that Gibson does request the relief precluded by Barnes, we reaffirm the principle cited above and refuse to consider the request.

Contrary to the assertions of the government, however, Gibson does request that this court void the entire plea agreement and remand for further

proceedings – either a new round of negotiations between the government and Gibson or a trial. (Appellant's Br. at 14-15, 19.) We have the power to provide this relief. *See, e.g., Barnes*, 83 F.3d at 941.

There is also a question as to whether Gibson has effectively waived his right to appeal his sentence. Gibson signed a plea agreement that included the following clause:

> The Defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, the Defendant knowingly and voluntarily waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever, including any ordered restitution, in exchange for the concessions made by the United States in the plea agreement. . . .

(Def.'s Plea Agrmt. at 5) (emphasis added). A voluntary and knowing waiver of an appeal is valid and enforceable. *United States v. Sines*, 303 F.3d 793, 798 (7th Cir.2002) (citations omitted). By the terms of the plea agreement, however, Gibson has not waived an appeal of a sentence that exceeds the maximum sentence provided for in the statute of conviction, which is the case here. Furthermore, the claim that a plea agreement was entered into involuntarily cannot

be waived in the plea agreement. *Id.* Thus, we will consider the appeal on its merits.

Gibson argues that the district court erred in accepting a plea agreement that included an illegal sentence and that he did not knowingly and voluntarily enter a guilty plea. When a defendant fails to object on these grounds while still before the district court, we apply the "demanding standard of plain error." *United States v. Gilliam*, 255 F.3d 428, 433 (7th Cir.2001). As Gibson moves to withdraw his guilty plea for the first time before this court, to provide such relief we must find under the plain error standard: "(1) an error has occurred, (2) it was 'plain,' (3) it affected a substantial right of the defendant, and (4) it seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

As we commented above, Gibson was sentenced on Count 1 to an agreed term of imprisonment of more than twenty-one years – far beyond the five-year maximum under 18 U.S.C. § 371. However, "[e]ven when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law." *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir.2002).

Because Gibson's sentence exceeds the maximum term of imprisonment set forth in the statute of conviction, there was error in accepting this plea agreement. And because this error is apparent from the language of 18 U.S.C. § 371, the error was "plain." Further, the imposition of a sentence exceeding the

statutory maximum affects a defendant's substantial rights. *Cf. United States v. Robinson*, 250 F.3d 527, 529-30 (7th Cir.2001) (noting that an increased sentence because of plain error under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), affects a defendant's substantial rights).

But the heart of the inquiry is whether the district court's error in accepting the plea agreement seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Although we have not found cases applying the plain error standard to the factual scenario in the instant case, we have stated that we will overturn a criminal conviction under this standard only when "necessary to avoid a miscarriage of justice." *United States v. Raney*, 342 F.3d 551, 559 (7th Cir. 2003) (noting that even if evidence was improperly admitted at a jury trial, there is no miscarriage of justice if the defendant's guilt was so clear that he would have been convicted anyway). Likewise, technical misstatements of the law by a trial judge at a sentencing hearing do not "impugn the integrity of the proceedings" when the error does not "alter [the defendant's] decision-making calculus." *United States v. Kelly*, 337 F.3d 897, 905 (7th Cir.2003).

Gibson and the government utilized former Rule 11(e)(1)(C) in structuring the plea agreement. This rule stated in relevant part:

> [The parties] agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

Fed.R.Crim.P. 11(e)(1)(C) (2002) (emphasis added). The parties in forming the agreement may have concluded that the statutory maximum sentence for Mail Fraud or Wire Fraud (30 years) could be imported into the Conspiracy count. Although it is unclear how or why this error occurred, it is clearly not, as the government argues, a mere "scrivener's error."[3]

Gibson does not dispute that he has received the precise amount of prison time for which he bargained. Nor does he dispute that, had he been tried under the eight-count indictment or had the parties used one of the wire or mail fraud counts in the plea agreement

---

[3] Black's Law Dictionary defines "scrivener's error" as a synonym for "clerical error." A "clerical error" is one "resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." Black's Law Dictionary 563 (7th ed.1999). Examples of clerical, or "scrivener's," errors include "omitting an appendix from a document; typing an incorrect number; mistranscribing a word; and failing to log a call." *Id.* Here, the parties apparently had Count 1, Conspiracy, in mind before and after the transcription. The mistake was not one of transcription, but of legal knowledge or analysis.

instead of the conspiracy count, a 262-month sentence would have been acceptable upon conviction. Indeed, Gibson makes no argument that the error at issue affects the fairness, integrity or public reputation of the judicial proceedings.[4]

The fact remains, however, that Gibson was sentenced to a term of imprisonment that exceeds the maximum provided in the count of conviction. To allow an illegal sentence to stand would impugn the fairness, integrity, and public reputation of the judicial proceedings that have taken place in this case. This error was not harmless.

There is no doubt that the district judge would not have accepted the plea agreement knowing that the maximum term of imprisonment was five years, or, if given the opportunity, would have reached the same result we do today. Clearly the integrity of the judicial system would be offended by ignoring this error even in a case involving facts as egregious as those asserted against Gibson.

III. Conclusion

As to the statute of conviction, 18 U.S.C. § 371 (Count 1), we Vacate the sentence, conviction, guilty

---

[4] There is no claim made, for example, that Gibson did not misuse his position of trust to bilk millions of dollars from orphans, widows, and individuals with disabilities relying on the stream of payments he promised to provide for medical and other family expenses.

plea and acceptance thereof and Remand this case to the district court for further proceedings.

IN THE DISTRICT OF THE
UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
Plaintiff(s),	)	Case No. 01-30005-GPM
vs.	)	
JAMES R. GIBSON,	)	
Defendant(s).	)	

STATUS CONFERENCE

BE IT REMEMBERED AND CERTIFIED that heretofore on 4/11/02, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, Honorable G. Patrick Murphy, United States District Judge, presiding. The following proceedings were recorded by mechanical stenography; transcript produced by computer.

APPEARANCES:

***FOR PLAINTIFF*: Hal Goldsmith, Miriam Miquelon and Michael Thompson** of U.S. Attorney's Office – Fairview Heights, 9 Executive Drive, Suite 300, Fairview Heights, IL 62208

***FOR DEFENDANT*: Arthur S. Margulis** of Margulis, Grant et al., 11 South Meramec, Suite 1330, St. Louis, MO 63105.

***REPORTED BY*: Molly N. Clayton, RPR,** Official Reporter for United States District Court, SDIL, 750 Missouri Ave., East St. Louis, Illinois 62201, (618) 482-9226,

molly_clayton@ilsd.uscourts.gov

* * *

[11] possibility of a Rule 35 motion to be filed by the government at some later time if they are so inclined with your discretion to follow after that. Mr. Gibson, since the presentence report, has had a difference of opinion with me as to whether or not to object to that report. And I believe if you think I'm out of line talking about it now instead of Monday please stop me, but I wanted to caution the Court that on Monday when we address the question of objections to the report my position is going to be we really shouldn't be objecting to this report; number one, because we've agreed to it and, number two, because it's against the spirit within which we entered into this agreement. And if Mr. Gibson persists in his position, which I think is counterproductive to his best welfare, then, he and I are going to be having a difference.

THE COURT: I understand.

Now, Mr. Gibson, what did you have to say?

MR. GIBSON: Well, sir, I have had ineffective counsel, clearly. Only part of the truth is coming out here. And I am seeking that you appoint me new counsel. I don't believe that that's an unreasonable position.

We were not truly prepared to go to trial.

THE COURT: Well, Mr. Gibson, the issue right now is if I get there, if I decide to sustain the plea agreement –

MR. GIBSON: The reason –

THE COURT: – which is the next thing on the docket [12] there's not gonna be any reason to appoint counsel. If I decide not to sustain the agreement then we're going to have to do something about getting you a lawyer.

If I sustain the agreement what happens is the marshals just take you out and you go to prison. That's what that is.

MR. GIBSON: I understand that, sir. I understand that and I appreciate your candidness. What I'm attempting to say is I think the letter certainly is the impression that he almost received a bonus for my guilty plea, Mr. Margulis did.

THE COURT: Mr. Gibson, I'm not here to advocate on behalf of the lawyer in this case, but at the same time he's in a very difficult situation. He sent you the letter. That is exactly what he should have done. If that had been a problem for you it should have been brought to my attention. You came here in front of me and you took an oath, and having taken the oath you told me that you were quite satisfied with your lawyer and it was perfectly obvious that you were. And now looking at what he negotiated for you and what you're looking at it looks to me like

he's done a pretty good job. If you just look at what's in front of us it's possible that you could live 22 years. It's not likely –

MR. GIBSON: Not likely.

THE COURT: – but it's possible. But it's almost impossible to believe that you would live long enough to ever [13] get out of prison if you get the kind of time that the probation people are looking for. You may live to be 78 but the chances of you living to be 85 are slim to none.

MR. GIBSON: Judge, I did not effect [*sic*] a financial institution and without that we would not be getting into the increase in the time: We'd be talking five years. And a lot of things that have been shared with me by my attorney in private and even the day that I pled out is not what he's stating here today.

THE COURT: Well, Mr. Gibson.

MR. GIBSON: That's the reason I wanted very candidly why I wanted to be appointed new counsel.

THE COURT: Well, the issue of whether you get appointed counsel is something else again.

MR. GIBSON: He's over pled me 17 years, your Honor. I truly believe that.

THE COURT: Well, Mr. Gibson, I'll – I have the matter under advisement. But you're not any better at lawyering than you are at running grocery

stores, and we know you couldn't do that. So what you need to do is you have one of the premier lawyers in the Midwest. You need to carefully consider what he's telling you. But I haven't made up my mind yet what I'm going to do. I have a situation here where a deal has been negotiated which is about two-thirds of what the guidelines call for. If you're sentenced under the guidelines

* * *

IN THE DISTRICT OF THE
UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No.
vs.	)	01-30005-GPM
JAMES GIBSON,	)	
Defendant.	)	

CHANGE OF PLEA

BE IT REMEMBERED AND CERTIFIED that heretofore on 1/8/02, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, ***HONORABLE G. PATRICK MURPHY***, United States District Judge, presiding. The following proceedings were recorded by mechanical stenography, transcript produced by computer.

APPEARANCES:

FOR PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE, **BY: Hal Goldsmith and Miriam Miquelon**, 9 Executive Dr., Suite 300, Fairview Heights, Illinois 62208

FOR DEFENDANT: MARGULIS & GRANT, BY: Arthur Margulis, 11 South Meramec, Suite 1330, St. Louis, Missouri 63105

REPORTED BY: ***Molly N. Clayton***, **RPR,** Official Court Reporter for United States

District Court, Southern District of Illinois, 750 Missouri Ave., East St. Louis, Illinois 62201, (618) 482-9226

* * *

[21] States attorney told me. Is that true?

MR. GIBSON: Yes.

THE COURT: Throughout this proceeding you've had the benefit of the counsel of Mr. Margulis, who enjoys a reputation of being a preeminent criminal defense lawyer, you've had plenty of time to counsel and consult with him, I take it.

MR. GIBSON: Yes.

THE COURT: Are you satisfied with his performance and to have him represent you?

MR. GIBSON: Yes.

THE COURT: All right. That being the case, Mr. Gibson, I ask you one time for all time, how do you plead to count 1 of the superseding indictment: Guilty or not guilty?

MR. GIBSON: Guilty.

THE COURT: Since you acknowledge that you are in fact guilty as charged in count 1; since you know your right to a trial; what the maximum possible punishment is; and since you are voluntarily pleading guilty; I will accept your guilty plea and enter a judgment of guilty on your plea.

However, pursuant to section 6B1.1(c) of the guidelines I have to defer my decision to accept or reject the plea agreement between you and the government until after I have had an opportunity to consider the presentence report. In fairness, I do not expect there will be a problem there at all.

* * *

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 17, 2007

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 05-4327

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Southern District of Illinois.
v.	No. 01 CR 30005
JAMES R. GIBSON, *Defendant-Appellant.*	J. Phil Gilbert, *Judge.*

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and the judges of the panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Case No. 2001-CR-30005-JPG
Plaintiff,	)	
v.	)	
JAMES GIBSON,	)	
Defendant.	)	

MEMORANDUM OF LAW EXPLAINING THE COURT'S MARCH 14, 2005 ORAL RULINGS,

GILBERT, District Judge:

This matter comes before the Court on the following pre-trial motions made by Gibson, all of which were denied at the March 14, 2005 hearing in this case (see Minute entry at Doc. 415): (1) motion for reconsideration of the Court's denial of Gibson's motion to dismiss the indictment (Doc. 390); (2) motion for the Court to respond directly to Gibson's accusation that the grand jury forepersons' signatures on the indictments were forged (Doc. 393); motion for reconsideration of the Court's Order permitting the Government to reinstate all of the counts previously dismissed (Doc. 394); motion for recusal of Judge Gilbert (Doc. 395); motion on general issues Gibson wishes to raise in the circuit court of appeals prior to trial (Doc. 399); motion for a bond hearing (Doc. 400); motion for the Court to address safety issues and the assistance by stand-by counsel (Doc. 401); and motion

requesting the Court to refer Gibson's allegations of criminal acts to the

* * *

person to conclude otherwise. See 28 U.S.C. §455(a). Nor does the Court harbor prejudice against Gibson. 28 U.S.C. §455(b)(1).

Fifth, Gibson identified several issues he wants to immediately appeal (Doc. 399), though it's and to squeeze a specific prayer for relief out of this motion. For its part, the Government characterized Gibson's motion as a mislabeled notice of appeal. Given the liberal pleading standards that apply to pro se litigants, the Government's suggestion is a good one and the Clerk of Court will be directed to docket the motion accordingly. But that in itself brings us into yet another thicket; given that a notice of appeal has been filed in this case, does this Court have jurisdiction to proceed with trial? As *United States v. Cannon*, 715 F.2d 1228, 1231 (7th Cir. 1983), recognized, "[t]he general rule is that an appeal suspends the district court's power to proceed further in a cause." But that case also added one qualification: "[t]his rule, however, has no application where there is a purported appeal from a nonappealable order." So the question under *Cannon* becomes whether Gibson's appeal – which was from the denial of a motion to dismiss the indictment on statute-of-limitations grounds – is immediately appealable. The answer is no. *United States v. Garib-Bazain*, 222 F.3d 17, 18 (1st Cir. 2000); *United States v. Pi*, 174 F.3d 745 (6th

Cir. 1999); *United States v. Levine*, 658 F.2d 113, 129 (3d Cir. 1981). To be sure, the Government reads Gibson's motion to assert a double jeopardy claim as well as a statute-of-limitations claim. And unlike an appeal based on statute of limitations, double jeopardy challenges *are* immediately appealable. *Abney v. United States*, 431 U.S. 651 662-63 (1977). Therefore, if *Abney* governs this case, this case must come to a screeching halt. But even assuming the Government is correct and Gibson's pleadings could plausibly be read in this manner, he's still not out of the woods yet. *Abney*, too, has been qualified by *United States v. MacDonald*, 435 U.S. 850 (1978). And based on the record in this case. Gibson can't make a colorable showing that he's been placed in jeopardy once for the instant offenses. *MacDonald*, 435 U.S. at 862. Finally, to the extent Gibson seeks to appeal the adverse decision on his motion for recusal, the Court considers the Government's statement of the law accurate and leaves Gibson to pursue his remedy via an original petition for mandamus in the circuit court.

Gibson next moved for a bond hearing. (Doc. 400). The Government noted in response that this issue has been thoroughly addressed. The Court agrees.

Seventh, Gibson asked that various safety issues, and the assistance of his stand-by counsel, be addressed. (Doc. 401). At the March 14th hearing Gibson clarified that, for the most part, his desire was to "make a record" of what was allegedly happening to him in jail. To that extent, then, the record has been

made and the Court doesn't understand Gibson to seek any further relief. Relatedly, it's the Court's understanding that stand-by counsel has always been available for consultation to Gibson. Any "assistance" along those lines therefore also seems unnecessary. The remainder of Gibson's claims address matters of internal jail administration; as such, they're appropriately addressed to jail administration. If necessary, Gibson has the right to file a 42 U.S.C. §1983 lawsuit for an injunction after exhausting administrative remedies. This ruling is based in no small part on

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CRIMINAL NO. 01-30005-GPM
JAMES R. GIBSON, et al.,	)	
Defendants.	)	

DEFENDANT'S AGREEMENT TO PLEAD GUILTY

(Filed Jan. 8, 2002)

Pursuant to Rule 11(e)(1)(C) of Federal Rules of Criminal Procedure, the attorney for the Government has been informed by the attorney for the Defendant that the Defendant contemplates the entry of a plea of guilty in this cause.

The terms of this Plea are as follows:

I.

1. Defendant acknowledges that he has been advised of and does fully understand the following:

(a) the nature of the charges to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(b) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(c) that if he pleads guilty, there will not be a further trial of any kind, so that by pleading guilty, he waives the right to a trial; and

(d) that if he pleads guilty, the Court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement; and

(e) that if he pleads guilty, he will waive his right to persist in his plea of not guilty, to be tried by a jury, to have assistance of counsel at the trial, and to confront and cross-examine witnesses against him at trial.

(f) that if he pleads, he is pleading guilty to a felony *punishable* by a term of imprisonment exceeding one year. Therefore, no matter what sentence the Court imposes (whether probation or any term of imprisonment), he will be forbidden by federal firearms laws from possessing any type of firearm in his lifetime, unless he obtains relief pursuant to 18 U.S.C. § 925, or other appropriate *federal* statute.

2. Defendant acknowledges that this Agreement to Plead Guilty constitutes the entire agreement and

that no promises, inducements or representations, other than those specifically set forth in this Agreement to Plead Guilty were made to induce him to enter into this Agreement to Plead Guilty.

3. It is further understood that this agreement is limited to the Southern District of Illinois, and nothing herein is intended to bind other federal, state or local prosecuting authorities. *It is further understood that this Agreement to Plead Guilty does not prohibit the United States, any agency thereof, or any third party from initiating or prosecuting any civil proceedings directly or indirectly involving the Defendant.* In the event defendant fails to make full restitution according to this plea agreement then the agreement shall be null and void and this paragraph shall have no force and effect.

4. Defendant understands that this offense is subject to provisions and guidelines of the "*Sentencing Reform Act of 1984*" (Ch. II of the Comprehensive Crime Control Act of 1984, Title 28, United States Code, Section 994(a)).

5. Defendant understands that pursuant to Title 18, United States Code, Section 3013, as amended by Act of April 24, 1996, the Court will assess a "Special Assessment" of $100 per felony count (for offenses committed on or after April 24, 1996). Defendant understands that he will be ordered to pay the full amount of the special assessment prior to or at the time of sentencing.

6. Defendant understands that the Court must impose a term of "supervised release" to follow incarceration. *See* 18 U.S.C. § 3583; U.S.S.G. § 5D1.1.

7. Defendant understands that the Court may impose a fine, costs of incarceration, and costs of supervision *and that the government will recommend the imposition of a fine*. The estimated costs of imprisonment presently are $1,910.17 per month. The estimated costs of supervision presently are $217.18 per month.

The Defendant understands that if he is not currently detained that the Government will move for detention upon acceptance of the plea by the Court and if released the Defendant understands that if he commits any offense in violation of federal, state, or local law while on release in this case or violates any other conditions of release, the Government may request revocation of the Defendant's bond and forfeiture of any bail and may file additional charges or sentencing enhancement notices, in addition to any sanctions that may be imposed for violation of the Court's order setting the conditions of release. No action taken or recommendation made by the Government pursuant to this paragraph shall be grounds for the Defendant to withdraw his plea.

8. The Defendant will not be prosecuted in the Southern District of Illinois for any other crimes now known to the government.

9. Under Rule 11(e)(1)(C) the court may accept or reject the plea agreement or defer its decision until

it has reviewed the presentence report. If the court accepts the plea agreement, the judgment and sentence will be the disposition called for in the plea agreement. If the court rejects the plea agreement, it must advise the defendant of this fact, afford the defendant an opportunity to withdraw his plea, and advise the defendant that if he persists in his plea of guilty the disposition may be less favorable than contemplated in the plea agreement. Rule 11(e)(4).

10. The Defendant states that he has read this agreement and has discussed it with his attorney, and understands it.

II.

1. The Defendant will enter a plea of guilty to count one of the Superseding Indictment charging a violation of Title 18, United States Code, Section 371, Conspiracy to Commit Mail and Wire Fraud which affects the safety and security of a financial institution. The maximum penalty that can be imposed for each violation of §371 is 30 years' imprisonment or a $1,000,000 fine, or both, and at least 5 years' supervised release.

2. The Defendant understands that he is entering a guilty plea whereby the Government and the Defendant have agreed, pursuant to 11(e)(1)(c), to a sentence of 262 months, the maximum fine of $250,000, and restitution in the amount of $66,000,000. Restitution will be reduced by the actual amount derived from the receipt, sale or other disposition of any

assets forfeited, seized or belonging to the Defendant or any co-defendant. The court will determine the appropriate period of supervised release.

3. The Government and Defendant agree that under the Sentencing Guidelines, after all facts have been considered, Defendant will have an Offense Level of 39 and a Criminal History of I, whereby the sentencing range is 262-327 months. The Government and Defendant agree that the Defendant's fine range will be $25,000 to $250,000 according to U.S.S.G. § 5E1.2.

4. The Government anticipates that the Base Offense Level in this case will be 6 pursuant to U.S.S.G. § 2F1.1(a).The Government and Defendant agree that the specific offense characteristics of 2F1.1(b)(1)(S), (b)(2), (b)(3), (b)(6) and (b)(8) will apply, thus the Defendant's initial Guideline Offense level should be increased 28 levels, creating a base offense level of 34. (i) The Government and Defendant agree that victim-related adjustments under 3A1.1(b)(2) will apply to this offense and increase the total offense level by 4 levels to 38.

5. The Government and Defendant agree that his role in the offense will be increased under. 3B1.1(c) by 2 points increasing the total offense level to 40. Defendant abused a position of trust and the Government and Defendant agree that the offense level will increase by 2 points increasing the total offense level to 42.

6. The Government anticipates that there will be no finding that Defendant has obstructed justice in this case and therefore, pursuant to U.S.S.G. § 3C1.1, the Defendant's base offense level will not be increased.

7. The Government anticipates that by pleading guilty the Defendant may be entitled to a reduction of 3 Levels based upon a finding by the Court that the Defendant has demonstrated an acceptance of personal responsibility for his criminal conduct which would thereby reduce the Offense Level to 39 from Offense Level 42.

8. The Government believes that the Defendant has amassed 0 Criminal History points and that his Sentencing Guideline Criminal History Category is I.

10. The Defendant agrees to the imposition of a fine in the amount of $250,000.

11. The Defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, the Defendant knowingly and voluntarily waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever, including any ordered restitution, in exchange for the concessions made by the United States in this plea agreement. The Defendant also waives his right to challenge his sentence or the manner in which it was

determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255.

12. The Defendant agrees to make restitution to the former personal injury clients of SBU up to the amount of $66,000,000 (sixty six million dollars) with a credit to be applied for the actual value derived from the receipt of any assets seized by the Government or otherwise forfeited as of the date of this plea agreement. The Defendant agrees to make full disclosure of the location of all of his assets, those in title of Marjorie Gibson and/or any assets transferred to any family member as of January 1, 1999 and agrees to relinquish all right, title and interest to and in same and transfer to the Government for purposes of making restitution to the victims whether or not the assets were purchased with monies converted by James R. Gibson or SBU, Inc.. Any failure by Defendant to comply with the terms of this agreement shall not release the Defendant from full compliance with the terms for making full restitution as set forth in this agreement.

13. In the event that the Defendant cooperates in any future prosecution instituted in the Southern District of Illinois, the Government may at its sole discretion file a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure taking into account such cooperation. The Motion, if any, will *only* be filed if the assistance rendered by the Defendant is found to be complete and *thoroughly truthful,* regardless of the outcome of any trial or hearing at which the Defendant may testify. *The Defendant understands*

that any reduction of sentence, and the extent of that reduction, lies in the discretion of the Court.

14. Defendant agrees that the items identified in Count 8, paragraphs 3, 4, 5(a)-(k), and 6 of the Superseding Indictment are forfeitable to the United States of America as property involved with a violation of Title 18, United States Code, Section 1956(h).

Defendant agrees to a forfeiture monetary judgment of $35,000,000. Said judgment may be enforced as an ordinary monetary judgment or by the forfeiture of substitute assets or by both methods so long as a double recovery is not obtained. Defendant further stipulates that the property described in United States v. All Funds, Case No. 01-1012-DRH is subject to forfeiture, that Defendant will raise no claim nor defense to said forfeiture, and that he agrees that a forfeiture judgment may be entered in said case with no further notice to him or hearing.

W. CHARLES GRACE
United States Attorney

/s/ James Gibson
JAMES GIBSON
Defendant

/s/ Hal Goldsmith
Hal Goldsmith
Assistant United States Attorney

/s/ Arthur S. Margulis
Arthur S. Margulis
Attorney for Defendant

/s/ Miriam F. Miquelon
Miriam F. Miquelon
Assistant United States Attorney

Date: 1-8-02

Date: 1-8-02

85

(2)

No. 07-506

FILED
FEB 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JAMES R. GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals impermissibly vacated petitioner's guilty plea *sua sponte*.

2. Whether petitioner was entitled to the benefits of a plea agreement that the court of appeals invalidated at the request of petitioner.

3. Whether, following vacation of petitioner's guilty plea by the court of appeals, petitioner could, consistent with the Double Jeopardy Clause, be tried on the count to which he pleaded guilty and on the counts that were dismissed pursuant to the plea agreement.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 516 U.S. 137 (1995) 10
Bendix Autolite Corp. v. *Midwesco Enters., Inc.*, 486 U.S. 888 (1988) 11
Dawson v. *United States*, 77 F.3d 180 (7th Cir. 1996) .. 11
Ellis, In re, 356 F.3d 1198 (9th Cir. 2004) 7
Hawk v. *Berkemer*, 610 F.2d 445 (6th Cir. 1979) 12
Klobuchir v. *Pennsylvania*, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031 (1981) 12
Lockhart v. *Nelson*, 488 U.S. 33 (1988) 12
Ohio v. *Johnson*, 467 U.S. 493 (1984) 12
United States v. *Barker*, 681 F.2d 589 (9th Cir. 1982)) ... 12
United States v. *Barnes*, 83 F.3d 934 (7th Cir.), cert. denied, 519 U.S. 857 (1996) 8
United States v. *Barron*, 172 F.3d 1153 (9th Cir. 1999) .. 10
United States v. *Bernard*, 373 F.3d 339 (3d Cir. 2004) ... 8
United States v. *Greatwalker*, 285 F.3d 727 (8th Cir. 2002) 8
United States v. *Green*, 139 F.3d 1002 (4th Cir. 1998) .. 12
United States v. *Lopez*, 385 F.3d 245 (2d Cir. 2004) 7
United States v. *Moulder*, 141 F.3d 568 (5th Cir. 1998) . 12

Cases—Continued: Page

United States v. *Mukai*, 26 F.3d 953 (9th Cir. 1994) 8
United States v. *Patterson*, 381 F.3d 859 (9th Cir. 2004) 7
United States v. *Peterson*, 268 F.3d 533 (7th Cir. 2001) ... 8
United States v. *Tateo*, 377 U.S. 463 (1964) 12
United States v. *Thurston*, 362 F.3d 1319 (11th Cir. 2004) 12
United States v. *Transfiguracion*, 442 F.3d 1222 (9th Cir. 2006) 9
United States v. *Zweber*, 913 F.2d 705 (9th Cir. 1990) ... 11

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause) 5, 6, 11, 12
18 U.S.C. 371 ..... 2, 4, 6, 8, 11
18 U.S.C. 924(c)(1) 10
18 U.S.C. 1341 (Supp. V 2005) 2
18 U.S.C. 1343 (Supp. V 2005) 2
18 U.S.C. 1956(h) 2

Miscellaneous:

Fed. R. Crim.:
Rule 11(c)(4) 3, 8
Rule 11(e)(1)(C) 4

In the Supreme Court of the United States

No. 07-506

JAMES R. GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 490 F.3d 604. The earlier opinion of the court of appeals (Pet. App. 11-23) is reported at 356 F.3d 761.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2007. A petition for rehearing was denied on July 17, 2007 (Pet. App. 32). The petition for a writ of certiorari was filed on October 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Southern District of Illinois, petitioner was convicted of conspiring to commit mail and

wire fraud, in violation of 18 U.S.C. 371. He was sentenced to 262 months of imprisonment. On appeal, the court of appeals vacated his guilty plea, conviction, and sentence, and remanded the case to the district court for further proceedings. Pet. App. 11-23 (*Gibson I*). On remand, the district court reinstated the counts of the indictment that were dismissed pursuant to the plea agreement. Following a jury trial, petitioner was convicted on the mail and wire fraud conspiracy count, in violation of 18 U.S.C. 371; on three counts of mail fraud, in violation of 18 U.S.C. 1341 (Supp. V 2005); on two counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. V 2005); and on one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). He was sentenced to 480 months of imprisonment, to be followed by a three-year term of supervised release. He also was ordered to pay restitution in the amount of over $83 million.

1. Petitioner was the owner of SBU, Inc. and several other companies in the St. Louis, Missouri, area. SBU was in the business of arranging tax-advantaged structured settlements in personal injury cases. Petitioner represented to his clients that their structured settlements would be funded with United States Treasury obligations, such as Treasury Bonds; that these obligations would be transferred to a third-party trustee to be held in irrevocable and segregated trusts for each client's sole benefit; and that the clients would receive periodic payments from the interest and proceeds from the redemption of the Treasury obligations. SBU client's sent their personal injury settlement funds directly to petitioner. Pet. App. 2.

After a period of purchasing Treasury obligations with his clients' settlement funds as represented, peti-

tioner ceased making those purchases. Instead, he spent $16.856 million of his clients' money on unauthorized business transactions, high risk investments, and purchases of real estate and luxury items for his own benefit. Petitioner then began redeeming the Treasury obligations he had purchased for his clients and spending the proceeds for himself. Petitioner's clients incurred a total loss of $156,194,810.92 as a result of petitioner's misconduct. Many of the clients needed the money they lost to support themselves and to pay for necessary medical treatment. Pet. App. 3.

When petitioner's attorney informed him that he was under investigation by the government, petitioner and his wife set sail for Belize and wired $3,478,352 of his clients' trust funds to Belize bank accounts. Petitioner returned briefly to the United States but departed for Belize again in 1999. Pet. App. 3.

2. As a result of his misconduct, petitioner was indicted on one count of conspiring to commit mail and wire fraud; three counts of mail fraud; two counts of wire fraud; and one count of money laundering conspiracy. Thereafter, petitioner and the government entered into a plea agreement that provided, among other things, that the parties "agreed, pursuant to [Federal Rule of Criminal Procedure] 11(e)(1)(C), to a sentence of 262 months imprisonment, the maximum fine of $250,000, and restitution in the amount of $66,000,000." Pet. App. 14.[1] The plea agreement also mistakenly stated that the maximum penalty that could be imposed on the mail and wire fraud count was 30 years of impris-

[1] The rule is now embodied in Rule 11(c)(1)(C). It states that a plea agreement may specify that the parties agree to a particular sentence. If the district court accepts the plea agreement of that type, the court is required to impose the agreed sentence. Fed. R. Crim. P. 11(c)(4).

onment. *Id.* at 14, 16, 19. On January 8, 2002, pursuant to the plea agreement, petitioner pleaded guilty to the mail and wire fraud conspiracy count, the government dismissed the remaining counts, and petitioner was sentenced to 262 months of imprisonment. *Id.* at 4.

3. Petitioner appealed. Both parties agreed that petitioner's sentence of 262 months was unlawful because the maximum sentence authorized for conspiracy under 18 U.S.C. 371 is five years of imprisonment. Pet. App. 16. Petitioner contended that the district court erred in accepting a plea agreement that included an unlawful sentence. *Id.* at 19. He also argued that, because he was unaware that he had agreed to an unlawful sentence, he did not knowingly and voluntarily enter a guilty plea. *Ibid.* He asked the court of appeals to "void the entire plea agreement and remand for further proceedings—either a new round of negotiations between the government and [petitioner] or a trial." *Id.* at 17-18; see also *Gibson I* Pet. C.A. Br. 19 ("This Court should hold that the plea and the plea agreement are void and remand this case for further proceedings in the district court.").

Applying the plain-error standard of review, the court of appeals vacated the guilty plea, conviction, and sentence, and remanded the case to the district court for further proceedings. Pet. App. 22-23. In so doing, the court concluded that the district court committed plain error in accepting the plea agreement and in sentencing petitioner above the statutory maximum. *Id.* at 19-22. The court stated that it lacked authority under Rule 11(e)(1)(C) to preserve the guilty plea yet discard the sentence. *Id.* at 17. It explained that, "because the plea agreement * * * contained explicit provisions regarding the exact term of imprisonment, [petitioner] can only

attack the validity of the entire plea agreement. He cannot seek to uphold the plea agreement, yet obtain relief in the form of a different sentence." *Ibid.*

4. On remand, the government moved to reinstate the counts of the indictment that were dismissed pursuant to the plea agreement. The district court granted the motion. Pet. App. 4. Thereafter, a jury found petitioner guilty on all counts. He was sentenced to 480 months of imprisonment, to be followed by three years of supervised release, and he was ordered to pay restitution in the amount of $83,282,767.42. *Id.* at 5.

5. In his opening brief on his second appeal, petitioner contended that three of the charges against him should not have been reinstated because they were barred by the statute of limitations. After filing his opening brief, petitioner filed numerous motions, which the court of appeals denied, to allow substitution of counsel and to delay oral argument to permit supplemental briefing. After oral argument, the court granted the motion for substitution of counsel and supplemental briefing, but declined to hear oral argument on the new issues raised. Those issues were whether, in *Gibson I*, the court had authority to vacate the guilty plea in the absence of a specific request by petitioner that it do so; whether the reinstatement of the dismissed charges violated the Double Jeopardy Clause; and whether the government continued to be bound by the promise it made in the plea agreement to dismiss the charges to which petitioner did not plead guilty.

The court of appeals rejected petitioner's claim that, in *Gibson I*, it should have preserved his guilty plea yet vacated the 242-month sentence thereby limiting him to a five-year sentence. Pet. App. 6. The court observed that, in voiding the entire plea agreement and remand-

ing for further proceedings, it had afforded petitioner the relief that he had requested. *Ibid.* The court also rejected petitioner's statute-of-limitations claim, which petitioner does not renew in this Court. *Id.* at 6-9. The court did not address petitioner's claim that the reinstatement of the dismissed charges violated the Double Jeopardy Clause.

ARGUMENT

Petitioner contends that the court of appeals erred in vacating his guilty plea and in allowing the government to retry him on the count to which he pleaded guilty and on the other counts in the indictment. He argues that, instead, the court should have preserved his guilty plea to the Section 371 conspiracy count; given effect to the plea agreement insofar as it required the government to dismiss the charges to which he did not plead; and vacated his 242-month prison sentence (to which he agreed as consideration for the dismissal of the charges) thereby limiting him to the five-year maximum sentence authorized for a Section 371 conspiracy conviction. Petitioner's claim is without merit and does not warrant the Court's review.

1. Petitioner argues (Pet. 11-15) that the court of appeals lacked authority to vacate his guilty plea without a specific request by him that it do so. But petitioner did make a specific request to set aside his guilty plea. In his opening brief in *Gibson I*, petitioner not only specifically asked the court of appeals to "remand this matter to the district court with directions for the district court to reject the plea agreement." *Gibson I* Pet. C.A. Br. 14-15. Petitioner also specifically asked the court to vacate his guilty plea because it was not knowing and voluntary. *Id.* at 19. In his reply brief,

petitioner reasserted those requests and explicitly acknowledged that, by seeking the above relief, he was "giving up something of value: *the government's dismissal of the remaining counts of the indictment.*" *Gibson I* Pet. C.A. Reply Br. 8 (emphasis added). Not surprisingly, the court of appeals in *Gibson I* expressly understood petitioner to challenge the validity of both his plea agreement and his guilty plea. Pet. App. 19. The court further recognized that petitioner sought a remand for "a new round of [plea] negotiations * * * or a trial." *Id.* at 17-18. In *Gibson II*, the court reiterated that, in *Gibson I*, it had provided petitioner with the relief that he had requested. *Id.* at 6. Petitioner is accordingly mistaken in contending that the court of appeals "*sua sponte* vacate[d] a plea." Pet. 11.

Petitioner argues (Pet. 11) that the decision below conflicts with those courts of appeals that have held that, when a district court rejects a plea agreement, it cannot unilaterally set aside the guilty plea, but must give the defendant the option either of withdrawing the plea or keeping the plea intact. *United States* v. *Lopez*, 385 F.3d 245, 251-252 n.13 (2d Cir. 2004); *United States* v. *Patterson*, 381 F.3d 859, 865 (9th Cir. 2004); *In re Ellis*, 356 F.3d 1198, 1208 (9th Cir. 2004) (en banc). Those cases, however, have no relevance here, because the petitioner specifically asked the court of appeals to set aside his guilty plea.

2. Petitioner also contends (Pet. 22-29) that, following the court of appeals' invalidation of the plea agreement in *Gibson I*, the government remained bound under the agreement by its promise to dismiss the charges. That claim constitutes a reversal of petitioner's position in *Gibson I*, in which he specifically acknowledged that, by seeking invalidation of the plea agreement, he was

"giving up" the dismissals. *Gibson I* Pet. C.A. Reply Br. 8.

Petitioner was not entitled both to vacation of the plea agreement and enforcement of the government's promise under the same agreement to dismiss charges. The government's promise to dismiss the remaining charges was made in consideration of petitioner's undertaking to plead guilty to the Section 371 conspiracy and his commitment to the 262-month sentence. The agreement of the parties concerning the exact term of imprisonment was binding on the sentencing court once it accepted the agreement, see Fed. R. Crim. P. 11(c)(4), and therefore was an "essential term" of the agreement. *United States* v. *Barnes*, 83 F.3d 934, 938 (7th Cir.), cert. denied, 519 U.S. 857 (1996). Petitioner could not simultaneously seek to set aside the plea agreement based on the mutual mistake of the parties that the 262-month sentence could be imposed for a conspiracy while preserving the government's promise to dismiss charges. When a plea agreement is based on a promise of a sentence that turns out to be illegal, the parties must be "return[ed] * * * to their initial positions." *United States* v. *Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002). As the Seventh Circuit explained in *United States* v. *Peterson*, 268 F.3d 533, 534 (2001), a defendant cannot "have the benefits of [a] plea agreement * * * without the detriments"; rather, "[t]he whole plea agreement stands, or the whole thing falls." Accord *United States* v. *Bernard*, 373 F.3d 339, 345 n.7 (3d Cir. 2004); *United States* v. *Mukai*, 26 F.3d 953, 956 (9th Cir. 1994) ("[A]ccepting Mukai's argument would require the district court to ignore a portion of the [Rule 11(c)(1)(C)] plea agreement while respecting the balance. The court does not have such authority.").

The Ninth Circuit cases on which petitioner relies (Pet. 26-28) do not help him. In *United States* v. *Transfiguracion*, 442 F.3d 1222 (2006), the defendants pleaded guilty to a drug count and provided full cooperation to the government pursuant to a plea agreement under which the government promised to dismiss other charges. Before sentencing, the Ninth Circuit held that the conduct to which the defendants pleaded guilty did not constitute a crime. The defendants then moved to dismiss the indictment and the district court granted the motion. On appeal, the government agreed that the charge to which the defendants pleaded guilty had to be dismissed, but argued that the plea agreement should have been rescinded so that the government could prosecute defendant on a count it had promised to dismiss. The Ninth Circuit rejected this argument, explaining that "with the liberty of [the defendants] at stake and their cooperation having already occurred, we cannot allow the government to rescind their plea agreements on the premise that all the parties mistakenly thought the defendants were pleading guilty to [conduct that constituted a crime]." *Id.* at 1230. The court expressed concern that, if the government were released from its promise to dismiss other counts, it could use the defendants' cooperation to help convict them. *Id.* at 1235.

This case is significantly different from *Transfiguracion*. Most fundamentally, in *Transfiguracion* the government, rather than the defendant, asked the court to set aside the plea agreement. Here, by contrast, petitioner seeks to have it both ways by binding the government to a plea agreement that he himself persuaded the court to invalidate. Moreover, an important factor in the decision in *Transfiguracion* was the impossibility of returning the parties to their initial positions because

the defendants had already provided full cooperation pursuant to the plea agreement. That factor is not present here.

Nor is petitioner helped by his reliance (Pet. 26-28) on *United States* v. *Barron*, 172 F.3d 1153 (9th Cir. 1999) (en banc). In that case, the defendant pleaded guilty pursuant to a plea agreement to three counts, including one count of using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). This Court subsequently determined that use of a firearm for purposes of Section 924(c)(1) means "active employment." *Bailey* v. *United States*, 516 U.S. 137, 143 (1995). Barron then collaterally attacked his conviction in light of *Bailey*. The district court held that the defendant could obtain relief only if he withdrew his guilty plea and the parties were returned to the *status quo ante*. Reversing, the court of appeals held that Barron was entitled to relief from his Section 924(c)(1) conviction and to the benefits of the plea agreement. *Barron*, 172 F.3d at 1157-1161. In so doing, the court explained that the defendant had simply moved to vacate a conviction that was void as a matter of law, and that his "motion did not attack the plea agreement in any way," nor "assert that [he] had entered the plea agreement unknowingly and involuntarily." *Id.* at 1158. In those circumstances, the court concluded that the defendant's motion was not a repudiation or breach of the plea agreement. *Ibid.* Here, by contrast, petitioner did repudiate the plea agreement by specifically asking the court in *Gibson I* to set it (and his guilty plea) aside. See *Gibson I* Pet. C.A. Br. 18 (arguing that peti-

tioner's "guilty plea and plea agreement were not entered into knowingly and voluntarily").[2]

3. Petitioner contends (Pet. 16-22) that, consistent with the Double Jeopardy Clause, he could not be tried either on the Section 371 conspiracy count to which he initially pleaded guilty or on the remaining counts that were initially dismissed. He argues that the decision of the court of appeals conflicts with decisions of other courts holding that jeopardy attaches at the time a guilty plea is accepted.

As an initial matter, petitioner raised this claim for the first time on appeal in his supplemental brief in *Gibson II*, and the court of appeals declined to address the claim. In these circumstances, the claim was waived. See *Bendix Autolite Corp.* v. *Midwesco Enters.*, 486 U.S. 888, 895 (1988). Moreover, because the court below did not review petitioner's claim, this case would be a highly inappropriate vehicle for this Court to address an alleged conflict in the circuits.

In any event, petitioner's claims lack merit. Petitioner relies on the general notion that jeopardy attaches with the acceptance of a guilty plea. Pet. 17-18 (citing *Dawson* v. *United States*, 77 F.3d 180, 182 (7th Cir. 1996)). The attachment of jeopardy, however, does not preclude a subsequent trial on the charges to which a

---

[2] Petitioner also relies upon (Pet. 28) the Ninth Circuit's decision in *United States* v. *Zweber*, 913 F.2d 705 (1990). In that case, the court of appeals rejected the defendant's argument that he was entitled to rescind his plea agreement and to withdraw his guilty plea in light of the parties' mutual mistake of law concerning the application of the Sentencing Guidelines. *Id.* at 710-711. Like *Transfiguracion* and *Barron*, *Zweber* did not involve an attempt by a party, such as petitioner, to obtain the benefits of a plea agreement that he had persuaded the court to invalidate.

defendant pleaded guilty when the defendant has succeeded in getting his guilty plea set aside. See, *e.g.*, *United States* v. *Tateo*, 377 U.S. 463, 466-467 (1964); *United States* v. *Thurston*, 362 F.3d 1319, 1322-1323 (11th Cir. 2004); *United States* v. *Moulder*, 141 F.3d 568, 571 (5th Cir. 1998); see also *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988) ("the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct or collateral attack, because of some error in the proceedings leading to conviction)."

Further, jeopardy did not attach to the dismissed counts because, with respect to those counts, petitioner neither pleaded guilty nor was otherwise "exposed to conviction." *Ohio* v. *Johnson*, 467 U.S. 493, 501 (1984). Accordingly, there was no double jeopardy bar to trial on the dismissed counts. See, *e.g.*, *United States* v. *Green*, 139 F.3d 1002, 1004 (4th Cir. 1998); *United States* v. *Barker*, 681 F.2d 589, 591 (9th Cir. 1982); *Klobuchir* v. *Pennsylvania*, 639 F.2d 966, 970 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); *Hawk* v. *Berkemer*, 610 F.2d 445, 447 (6th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

FEBRUARY 2008

86

(3)

No. 07-506

FILED

FEB 20 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JAMES R. GIBSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

GERALD R. SMITH
Counsel of Record
LAW OFFICES OF GERALD R. SMITH
505 W. Riverside, Suite 215
Spokane, WA 99201
Telephone: (509) 252-5051

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. With respect to Question 1 presented in the Petition: Whether Petitioner was ever advised, pursuant to Rule 11, of the consequences of persisting in his guilty plea and whether he ever requested to withdraw the plea.

2. With respect to Question 2 presented in the Petition: Whether Petitioner preserved the double jeopardy issue in the courts below and whether trial on dismissed charges violated double jeopardy.

3. With respect to Question 3 presented in the Petition: Whether the government is required to fulfill its promises in the plea agreement when Petitioner has never sought to withdraw the plea.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 1

1. AT NO TIME WAS PETITIONER ADVISED OF THE CONSEQUENCES OF PERSISTING IN HIS GUILTY PLEA NOR DID HE REQUEST ANY COURT TO WITHDRAW THE PLEA 1

2. PETITIONER DID NOT WAIVE THE DOUBLE JEOPARDY ARGUMENT, HAVING REPEATEDLY RAISED IT IN THE COURTS BELOW 4

3. PETITIONER IS ENTITLED TO ENFORCEMENT OF THE GOVERNMENT'S PROMISES IN THE PLEA AGREEMENT BECAUSE HE NEVER SOUGHT TO WITHDRAW THE PLEA 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Ohio v. Johnson, 467 U.S. 493 (1984) 6

OTHER CASES

Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979) 6

Klobuchir v. Pennsylvania, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031 (1981) 6

In re Ellis, 356 F.3d 1198 (9th Cir. 2004) (en banc) 2, 3, 4

United States v. Barron, 172 F.3d 1153 (9th Cir. 1999) 9

United States v. Barker, 681 F.2d 589 (9th Cir. 1982) 6

United States v. Bernard, 373 F.3d 339 (3rd Cir. 2004) 8

United States v. Gibson, 356 F.3d 761 (7th Cir. 2004) ("*Gibson I*") 3

United States v. Greatwalker, 285 F.3d 727 (8th Cir. 2002) 7

United States v. Green, 139 F.3d 1002 (4th Cir. 1998) 6

United States v. Lopez, 385 F.3d 245 (2d Cir. 2004) 2, 3, 4

United States v. Mukai, 26 F.3d 953 (9th Cir. 1994) 8, 9, 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Patterson, 381 F.3d 859 (9th Cir. 2004) 2, 3, 4

United States v. Peterson, 268 F.3d 533 (7th Cir. 2001) 8

United States v. Transfiguracion, 442 F.3d 1222 (9th Cir. 2006) 9, 10, 11

OTHER AUTHORITY

Fed.R.Crim.P. 11 ..... *passim*

INTRODUCTION

Respondent's Brief in Opposition rests on several erroneous statements of fact and law. The result is a series of straw man arguments that fail to address the important questions presented to this Court in the Petition. Attempting to distinguish cases that create a conflict in the Circuits or which otherwise support Petitioner's position, Respondent fails to make the most important distinctions, treating pleas and plea agreements as if they were the same thing and treating unauthorized arguments of appellate counsel as if they were the express statements of Petitioner. Indeed, Respondent's failure to make the proper distinctions magnifies the need for this Court to provide clarity by granting the Petition.

ARGUMENT

1. AT NO TIME WAS PETITIONER ADVISED OF THE CONSEQUENCES OF PERSISTING IN HIS GUILTY PLEA NOR DID HE REQUEST ANY COURT TO WITHDRAW THE PLEA.

Respondent asserts Petitioner asked the Court of Appeals in *Gibson I* to hold both the plea and the plea agreement void. Br. 4. Later, Respondent asserts Petitioner did make a specific request to vacate the plea in the Court of Appeals and that Petitioner erroneously states the Court sua sponte vacated the plea. *Id.* 6-7. It is on these assertions that Respondent

rests the conclusion that cases cited by Petitioner as showing a conflict among the Circuits are irrelevant.

Respondent's argument fails because it is not a specific request made allegedly on behalf of a defendant that the Rule requires, but a request made *specifically by the defendant* before a plea may be vacated. Both the old version and the new version of Rule 11 require the Court in open court to "*advise the defendant personally*" of the right to withdraw the plea and advise him or her the outcome may be less favorable if the defendant persists in the plea of guilty.

Thus, cases cited by Petitioner, including *United States v. Lopez*, 385 F.3d 245, 251-252 n.13 (2d Cir. 2004); *United States v. Patterson*, 381 F.3d 859, 865 (9th Cir. 2004); *In re Ellis*, 356 F.3d 1198, 1208 (9th Cir. 2004) (en banc), are relevant and establish a conflict. These cases uphold the principle that in the absence of a request specifically by the defendant, a court is without authority to vacate a validly entered guilty plea. Nowhere does Respondent's brief point to any authority that allows a court to vacate a plea without the *personal* involvement of the defendant. There simply is no such authority.

Related to the error concerning who must make the request to vacate a plea is the reliance by Respondent on errors below that merge pleas and plea agreements into one conceptual entity. They are not the same thing, nor are they even transactions between the same parties. A plea agreement is a

negotiated contract between the defendant and the government, while a plea is a transaction between the defendant and the Court. *Patterson*, *Lopez*, and *Ellis* all establish that a Court may reject a plea agreement while leaving the plea itself intact. As pointed out in the Petition, the plea agreement gave *Petitioner* the option of withdrawing the plea if the Court rejected the agreement and the District Court informed Petitioner precisely of that fact during the plea colloquy. Pet. 5-7; Pet. App. 30-31, 41.

No court has ever advised Petitioner personally of the right to withdraw his plea, afforded him the opportunity to do so, and advised him of the consequences of persisting in the plea. What is evident from the record is that had he been properly advised, he would have persisted in the plea. At the Status Conference before the sentence on the plea, Petitioner sought new counsel and informed the District Court of the five-year maximum sentence. Pet. App. 24-28. Instead of advising Petitioner of his rights, the Court merely responded that he had one of the "premier lawyers in the Midwest" and Petitioner should heed his advice. *Id.* 27-28.

Thus, the Seventh Circuit's conclusion that it could not preserve the plea yet discard the sentence in *United States v. Gibson*, 356 F.3d 761 (7th Cir. 2004) (*"Gibson I"*), Br. 4, Pet. App. 17, is directly counter to the law. If the District Court had discovered the error, its only option would have been to afford Petitioner the opportunity to withdraw the plea and proceed to sentencing *within the law* if

Petitioner had persisted. When the Court of Appeals discovered the error, its only option was to remand to the District Court so the Court could personally advise Petitioner. That is the lesson learned from *Patterson*, *Ellis*, and *Lopez*. This Court must resolve the conflict created by this case.

2. PETITIONER DID NOT WAIVE THE DOUBLE JEOPARDY ARGUMENT, HAVING REPEATEDLY RAISED IT IN THE COURTS BELOW.

Respondent asserts that Petitioner first raised the double jeopardy issue on appeal in the Supplemental Brief and therefore has waived it. This assertion is patently false. On remand after *Gibson I*, Petitioner, proceeding *pro se*, raised the issue in a motion for dismissal on August 31, 2004, which the District Court denied on October 27, 2004.[1] D.Ct. Dkt. 353, 360. A February 24, 2005, motion to reconsider was orally denied on March 14, 2005, with a written order filed on March 21, 2005. D.Ct. Dkt. 394, 415, 418. Petitioner filed an interlocutory appeal, which was dismissed on April 1, 2005. *See* Pet. 7-8.

Following his trial and sentence after remand, Petitioner appealed and immediately filed a motion in the Court of Appeals seeking to challenge the conviction on double jeopardy grounds. The motion was

---

[1] The August 31, 2004, filing date was incorrectly given as the date of the denial in the Petition.

denied on the ground that Petitioner was represented by counsel who "shall make all filings on his behalf." This was in error as Petitioner had proceeded *pro se* and had been represented only by stand-by counsel in the District Court. Stand-by counsel was subsequently appointed for the appeal on January 30, 2006. The Brief was not filed until over ten months later, on November 6, 2006, following five motions to extend time by appointed counsel. Petitioner filed a *pro se* motion for appointment of new counsel on November 13, 2006, so the issues could be raised. That motion was denied on November 30, 2006. A motion to stay oral argument and permit substitution of counsel so the double jeopardy and other issues presented here by Petitioner could be raised was denied, as was the motion to reconsider. The Court of Appeals did not permit substitution of counsel and supplemental briefing until after oral argument and denied oral argument on the new issues.

Thus, Petitioner raised the issue in the District Court and has consistently attempted to keep it before the Courts. Respondent appears to argue that it was because the issue had not been properly raised that the Seventh Circuit "declined to address the claim." Considering that the Circuit addressed other claims raised in the Supplemental Brief, it would be at best guesswork to determine why it did not specifically address the double jeopardy issue, but if the Court had believed the issue to be waived, it would almost certainly have said so. In any event, the Court implicitly ruled that double jeopardy had not been

violated by its refusal to address the issue. Despite Respondent's claim that this case would be a "highly inappropriate vehicle for this Court" to address the conflict, Br. 11, the procedural history of the case makes it a highly *appropriate* case for this Court.

Respondent's tautological argument that double jeopardy does not preclude trial when a defendant has successfully succeeded in having a plea set aside, Br. 11-12, is again irrelevant because, as argued in the Petition and *supra*, Petitioner never sought to have the plea set aside and he was the only one with authority of law to seek to have it nullified.

Finally, citing *Ohio v. Johnson*, 467 U.S. 493 (1984), Respondent asserts jeopardy did not attach to dismissed counts because Petitioner did not plead guilty to those counts nor was he otherwise exposed to conviction. Br. 12. Respondent does not respond to the analysis of *Johnson* by Petitioner and to the discussion of cases involving estoppel of prosecution on dismissed counts after a plea. Pet. 19-22.

Respondent then cites several cases in support of its argument that no double jeopardy bar existed with respect to dismissed counts in this case. The cases cited are *United States v. Green*, 139 F.3d 1002 (4th Cir. 1998); *United States v. Barker*, 681 F.2d 589 (9th Cir. 1982); *Klobuchir v. Pennsylvania*, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); *Hawk v. Berkemer*, 610 F.2d 445 (6th Cir. 1979). Respondent's purported authority misses the mark. In each of these cases, the defendant successfully sought, either on

appeal or in post-conviction proceedings, to have the conviction set aside. In none of the cases did the defendant contest the vacating of the original convictions. The cases cited by Respondent support nothing more than its earlier tautology that double jeopardy does not bar prosecution when a defendant successfully has a conviction vacated.

Because in this case a valid conviction by plea was improperly set aside and should be reinstated, the Double Jeopardy Clause is implicated and bars conviction on counts dismissed as a result of the plea. Pet. 16-22.

3. PETITIONER IS ENTITLED TO ENFORCEMENT OF THE GOVERNMENT'S PROMISES IN THE PLEA AGREEMENT BECAUSE HE NEVER SOUGHT TO WITHDRAW THE PLEA.

Respondent's arguments with respect to whether Petitioner was entitled to enforcement of the government's promises in the plea agreement also rely on the failure to distinguish properly between a plea and a plea agreement and on the false assertion that Petitioner sought to withdraw his plea. Respondent does not address the fundamental issue of enforcing what remains of a plea agreement after removal of unlawful provisions that result from a mutual mistake of law. *See* Pet. 22-29.

The cases relied on by Respondent are not relevant to the issues presented here. In *United States v.*

Greatwalker, 285 F.3d 727 (8th Cir. 2002), the defendant successfully appealed the denial of his motion to withdraw his plea. He argued on appeal that the 35-year sentence for first degree murder was illegal because the statute required a life sentence. The most noteworthy factor involved in *Greatwalker* was that it was the defendant who sought to withdraw the plea, both in the District Court and on appeal. Because the Court of Appeals vacated the plea based on the illegal sentence, any statements about other terms of the plea bargain are dicta, because the condition precedent required to trigger the government's obligations, i.e., a guilty plea, was effectively not performed.

Similarly, *United States v. Peterson*, 268 F.3d 533 (7th Cir. 2001) has little bearing on the issues here, and to the extent it is instructive, the case supports Petitioner's position. The defendant in *Peterson* sought relief from an order of restitution to victims of relevant conduct. The Court found the defendant had specifically agreed to the restitution in the plea agreement and, on that ground, affirmed the sentence. Similarly, the Appeals Court in *United States v. Bernard*, 373 F.3d 339 (3rd Cir. 2004), also cited by Respondent, affirmed after defendant agreed in the plea agreement to application of enhancements that would normally not apply under the United States Sentencing Guidelines. The defendant in that case was sentenced within the statutory limits.

A careful reading of *United States v. Mukai*, 26 F.3d 953 (9th Cir. 1994), also supports Petitioner's position. There, too, a Rule 11(e)(1)(C) agreement was

involved, in which the parties agreed that a sentence of not less than five years nor more than seven was the appropriate disposition. *Id.* at 954. The government appealed when the District Court denied its motion to withdraw from the plea agreement following the District Court's sentence of a term of probation. Respondent ignores the most salient fact of this case, which was the plea agreement specifically stated the government "shall be afforded an opportunity to withdraw from this plea agreement" if the sentence was less than five years imprisonment. *Id.* In the case before the Court, no such provision was in the plea agreement.

Thus, the cases cited by Respondent do not address the issue of enforcement of a plea agreement with the exception of illegal components. Nor do Respondent's arguments address the policy arguments and cases cited by Petitioner, Pet. 23-26, concerning enforcement of remaining elements of a plea agreement when an illegal sentence is agreed upon by the parties.

After relying on cases that are either irrelevant or supportive of Petitioner's position, Respondent then tries to distinguish *United States v. Transfiguracion*, 442 F.3d 1222 (9th Cir. 2006), and *United States v. Barron*, 172 F.3d 1153 (9th Cir. 1999). Br. 9-10. *Transfiguracion* and *Barron* (and the cases cited therein) are not materially distinguishable and support the position that a mutual mistake of law does not invalidate remaining elements of the plea agreement.

Respondent correctly states, Br. 9, that the *Transfiguracion* Court held that with liberty interests at stake, it could not allow the government to rescind the plea agreement. The Court also stated that the government could have, but did not, include in the plea agreement a provision that it could reinstate dismissed charges in the event the informations to which the defendants pled were dismissed for any reason. *Transfiguracion*, 442 F.3d at 1233. Similarly, the government here could have included terms that would permit it to reinstate counts if the sentence imposed was less than what was agreed upon or if a Court of Appeals erroneously vacated the guilty plea. It did not do so. *Cf. Mukai*, 26 F.3d 954.

The *Transfiguracion* Court also stated "The defendants' actions [in seeking dismissal] were not barred by the agreements' literal terms, so the agreements remain in force." 442 F. 3d at 1232. The agreement in this case goes much further. It not only fails to bar Petitioner's action in seeking to invalidate the illegal sentence in *Gibson I*, the plea agreement expressly permits him to appeal an illegal sentence. Pet. App. 43. In Paragraph 11 of Part II of the Agreement, the right to appeal a sentence is acknowledged with the provision that the right is waived *only* to the extent that the sentence is within the statutory maximum. As in *Transfiguracion*, Petitioner here pled guilty and did all else that was required of him by the agreement. The government can be held to no less.

Respondent implies that the *Transfiguracion* Court reached its decision based on a concern that the government could use the defendants' cooperation against them if it were released from its promise to dismiss counts. Br. at 9. While the Court did express that concern, it did so only in the context of what it would do "Even if considerations of fairness to the government were pertinent–which they are not, as the terms of the agreements favor the defendants' position. . . ." Thus, the Court would have reached the same decision whether defendants had cooperated or not. The fact that they cooperated does not distinguish *Transfiguracion* from this case in any meaningful way. The reasoning there is applicable with at least equal force here.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

GERALD R. SMITH
Counsel of Record
LAW OFFICES OF
GERALD R. SMITH
505 W. Riverside, Suite 215
Spokane, WA 99201
Telephone: (509) 252-5051